APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 107 OF 2015
and
APPEAL NO. 117 of 2015

Dated : 21st March, 2018

PRESENT : **HON'BLE MR. JUSTIC N.K. PATIL, JUDICIAL MEMBER**
HON'BLE MR. S.D. DUBEY. TECHNICAL MEMBER

APPEAL NO. 107 OF 2015

IN THE MATTER OF:

1. Haryana Power Purchase Centre
Shakti Bhawan, Sector 6
Panchkula-134009, Haryana

2. Haryana Power Generation Corporation Limited
Urja Bhawan, C-7, Sector 6
Panchkula, 134009, Haryana **……Appellants**

VERSUS

1. Haryana Electricity Regulatory Commission
Bays No. 33-36, Sector 4
Panchkula – 134112, Haryana

2. LancoAmarkantak Power Ltd.
Lanco House, Plot No. 397, Phase - III
Udyog Vihar, Gurgaon - 122016

3. PTC India Limited
2nd Floor, NBCC Tower,
15 Bhikaji Cama Place
New Delhi - 110066

4. Chhattisgarh State Power Trading Company
   VIdyut Seva Bhwaran, Danganiya,
   Raipur – 492013, Chhattisgarh

……Respondents

Counsel for the Appellant(s) : Mr. M.G. Ramachandran
Ms. Ranjitha Ramachandran
Mr. Shubham Arya
Ms.Anushree Bardhan
Ms. Poorva Saigal

Counsel for the Respondent(s) : Mr. S.B. Upadhyaya, Sr. Adv.
Mr. Deepak Khurana for R-2

Ms. Nishtha Kumar
Ms. Janmali M. for R-3

APPEAL NO. 117 of 2015

IN THE MATTER OF:

LANCO AMARKANTAK POWER LIMITED
Lanco House, Plot No. 397 Phase III,
Udyog Vihar, Gurgaon – 122 016
Through its Authorized Signatory (Mr. Anil Sharma)

…. Appellant

Versus

1. Haryana Electricity Regulatory Commission
   Bays No. 33-36, Sector – 4,
   Panchkula 134 112,
   Haryana (through its Secretary)

2. M/s. Haryana Power Generation Corporation Limited
   Urja Bhawan, C-7, Sector 6,
   HPGCL, Panchkula 134 109,
   Haryana (through its Managing Director)

3. M/s. Haryana Power Purchase Centre (on behalf of M/s Haryana Power Generation Corporation Ltd.).
   2nd floor, Shakti Bhawan, Sector -6,
   Panchkula 134109, Haryana (through its Chief Engineer)

4. PTC India Ltd.
   2nd Floor, NBCC Tower, 15,
   Bhikaji Cama Place,
   New Delhi – 110 066
   (Through its Chairman and Managing Director)

5. Chhattisgarh State Power Trading Co. Ltd.
   Vidyut Seva Bhavan, Danganiya,
   Raipur-492013, Chhattisgarh,
   (Through its Managing Director)

….Respondent(s)

Counsel for the Appellant(s) Mr. S.B. Upadhyaya, Sr. Adv.
Mr. Deepak Khurana

Counsel for the Respondent(s) Mr. M.G. Ramachandran
Ms. Ranjitha Ramachandran
Mr. Shubham Arya
Ms. Anushree Bardhan for R-2

Ms. Nishtha Kumar for R-4

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

APPEAL NO. 107 OF 2015

1. The present Appeal has been filed by the Appellants Haryana Power Purchase Centre (**'HPPC')** and Haryana Power Generation Corporation Limited (**'HPGCL')** under Section 111 of the Electricity Act, 2003 against the impugned Order dated 23.01.2015 passed by the Haryana Electricity Regulatory Commission (hereinafter called the **'State Commission'**) in Case No. HERC/PRO-05 of 2014. The State Commission on remand from this Tribunal, has proceeded to determine the ad-hoc interim Generation Tariff of Unit – 2 (300MW) of Respondent No. 2, Lanco Amarkantak Power Ltd. in Korba, Chhattisgarh (hereinafter referred to as **'Lanco'**) for the power supplied from the said Unit - 2 to the Appellant (hereinafter referred to as **'the Haryana Utilities'**) for the period in dispute.

2. The State Commission has proceeded to allow Rs.1235.28 Cr. as Net Capital Cost of Unit-2 and based thereon worked out the ad-hoc interim tariff at Lanco's Bus for supply of power from Unit – 2 to the Haryana Utilities at Rs.2.8875/kWh for the disputed period beginning 07.05.2011 to 31.03.2012 and Rs.2.9218/kWh for FY 2012-13 despite the fact that there were inconsistencies in and/or insufficiency of data - information provided by Lanco. In the circumstances, the exercise of tariff determination carried out by the State Commission is without proper and effective prudence check.

APPEAL NO. 117 of 2015

3. The present appeal has been filed by the Appellant Lanco Amarkantak Power Limited (**'LAPL'**) under Section 111 of the Electricity Act, 2003 challenging the legality, validity and propriety of the Order dated 23.01.2015 passed by Haryana Electricity Regulatory Commission (hereinafter called the **'State Commission'**) in Case No. HERC/PRO-05 of 2014 for interim tariff determination pursuant to the order dated 03.01.2014 passed by this Tribunal in Appeal No. 65 of 2013. The summary dismissal of the Application dated 04.02.2014 seeking relaxation of the provisions relating to O&M expenses in HERC Tariff Regulations 2008, by the Impugned Order is contrary to law. The HERC has failed to give any cogent reasons and deal with the contentions of the Appellant for not allowing the Appellant to claim O&M expenses as per CERC Tariff Regulations, 2009. The Appellant submits that the Impugned Order is contrary to law and facts and is liable to be set aside by this Tribunal.

4. The Haryana Power Purchase Centre **('HPPC')** the Appellant No. 1 in Appeal No. 107 of 2015 and Respondent No. 3 in Appeal No. 117 of 2015 is a Company incorporated under the provisions of the Companies Act, 1956 with its registered office at Shakti Bhawan, Sector 6, Panchkula, Haryana. The HPPC is the coordinating agency for the power purchases by the distribution licensees in the State of Haryana.

5. The Haryana Power Generation Corporation Ltd. **('HPGCL')** the Appellant No. 2 in Appeal No 107 of 2015 and Respondent No. 2 in Appeal No. 117 of 2015 is a Government of Haryana undertaking operating and maintaining generating stations in the State of Haryana.

6. The HERC is a State Electricity Regulatory Commission (established in terms of the Haryana Electricity Reform Act, 1997 read with the Electricity Act, 2003 **("Act"**) to perform various functions *inter alia* including regulating and approving tariff in terms of its mandate under the Act.

7. The Lanco Amarkantak Power Ltd. (**'LAPL'**) the Respondent No. 2 in Appeal No. 107 of 2015 and Appellant in Appeal No. 117 of 2015 is a generating company under the provisions of the Electricity Act, 2003 having its registered office at Lanco House, Plot No.4, Software Units Layout, Hitech City, Madhapur, Hyderabad – 500 081 and has established a generating unit being Unit II of 300 MW capacity at Amarkantak in the State of Chhattisgarh.

8. PTC India Ltd., (**'PTC'**) is Respondent No. 3 in Appeal No. 107 of 2015 and Respondent No. 4 in Appeal No. 117 of 2015 is a company constituted under the Companies Act, 1956 and licensed by the Central Electricity Regulatory Commission to undertake trading in electricity as an Inter State electricity trader.

9. The Respondent No.5 (in both the appeal) i.e. Chhattisgarh State Power Trading Co. Ltd., (**'CSPTCL'**) is an authorized representative of the Govt. of Chhattisgarh, a successor company of the erstwhile Chhattisgarh State Electricity Board and as a deemed licensee under the provisions of the Electricity Act it is engaged in the business of trading in electricity.

10. FACTS OF THE CASE IN APPEAL NO. 107 OF 2015

A. During 2005-06 Lanco had approached the Haryana Utilities through PTC, offering to supply electricity from its above generating unit then being established in the State of Chhattisgarh.

B. Lanco entered into a Power Purchase Agreement dated 19.10.2005 (as amended vide Supplemental Agreement dated18.09.2006) for sale of 273 MW from its above generating unit to PTC for a period of 25 years from the Commercial Operation Date of the Project at a levelised capped tariff rate of Rs.2.32 per unit. The above sale of power by Lanco to PTC specifically authorized PTC to make onward sale to one or more purchasers to be identified. Lanco and PTC together then identified the Haryana Utilities for sale and purchase of the above quantum of power.

Pursuant to the above, PTC entered into a back –to-back Power Sale Agreement dated 21.9.2006 with the Haryana Utilities for onward sale of power made available by Lanco under the Power Purchase Agreement dated 19.10.2005.

C. The Power Sale Agreement dated 21.9.2006 entered into between PTC and the Haryana Utilities was approved by the State Commission vide Order dated 6.2.2008**.**The Power Purchase Agreement dated 19.10.2005 was duly taken note of while granting the above approval.

D. Subsequently, Lanco raised issues on the implementation of the Power Purchase Agreement. PTC filed a petition before the State Commission on 13.5.2010, being Case No. HERC/PRO/12 of 2010 inter alia, seeking that the State Commission may direct the Haryana Utilities to make payment of tariff in accordance with the Tariff

Regulations of the Central Commission**.** In the petition, PTC raised the issue of increase in the capital cost and the cost of generation and supplying electricity, as per the terms of the Power Purchase Agreement at the capped tariff.

E. The Haryana Utilities also filed a petition being Case No. HERC/PRO/12 OF 2010 under Section 86 (1) (b) of the Electricity Act, 2003 on 22.7.2010 seeking Orders from the State Commission to restrain Lanco and PTC from revising the agreed tariff under the Power Purchase Agreement dated 19.10.2005 and to prevent Respondent No. 1 from selling the contracted power to third parties.

F. The aforementioned two petitions were heard together by the State Commission and were decided in favour of the Haryana Utilities by Order dated 2.2.2011.

G. After the arguments were heard by the State Commission in the above two petitions Lanco purported to terminate the Power Purchase Agreement with PTC vide letter dated 11.1.2011. A petition being No. 6 of 2011 was filed by the Haryana Utilities before the State Commission on 13.03.2011 challenging the termination of the Power Purchase Agreement by Lanco, questioning the same as unilateral, malafide and that the same was patently illegal and contrary to the provisions of the Power Purchase Agreement.

H. In the meanwhile, on or about 5.2.2011 Lanco filed an appeal before this Tribunal being Appeal No. 15 of 2011 challenging the order dated 2.2.2011 passed by the State Commission. The main challenge to the Appeal was on the aspect of the jurisdiction of the State Commission. The Counsel appearing for Lanco specifically restricted the challenge to the issue of jurisdiction.

I. By Order dated 4.11.2011 this Tribunal decided the Appeal No. 15 of 2011 holding that in the facts and circumstances of the case, the State Commission has the jurisdiction to entertain and decide the matters under the Power Purchase Agreement dated 19.10.2005 and the Power Sale Agreement dated 21.9.2006.

J. Aggrieved by the Order dated 4.11.2011 passed by this Tribunal, Lanco filed Civil Appeal No. 10329 of 2011 before the Hon'ble Supreme Court and the same is pending adjudication. By Order dated 16.12.2011 the Hon'ble Supreme Court in Civil Appeal No. 10329 of 2011 directed as under**:**

> *"Pending hearing and final disposal of the appeal, we issue following directions:*

(i) Lanco will continue to supply electricity as per the interim Order of the Tribunal dated 23rd March, 2011;

(ii) Without prejudice to the rights and contentions of the parties and pending further orders, ***the State Electricity Regulatory Commission, Haryana will fix****/approve the tariff for sale and purchase of power for the period in question about which there is a dispute between Lanco and PTC.*

The State Electricity Regulatory Commission, Haryana will decide the dispute uninfluenced by the observations made in the impugned Orders passed before today, by the Appellate Tribunal and/or any other Authority in this case. All arguments on both sides are kept open. Liberty is given to the parties to make a proper application supported by relevant documents before the State Electricity Regulatory Commission, Haryana, within four weeks".

K. In pursuance of the above, Lanco, on 12.1.2012 filed a petition before the State Commission to determine the tariff for the period from 7.5.2011 to 31.12.2011 and also for the power proposed to be supplied for the balance period in the financial year 2011-12 and also during the financial year 2012-13.

L. By Order dated 17.10.2012, the State Commission determined the tariff, inter alia, taking into consideration the terms and conditions of the Power Purchase Agreement dated 19.10.2005 as amended by the Supplemental Agreement dated 18.9.2006 entered into by Lanco with PTC and Power Sale Agreement dated 21.9.2006 entered into between PTC and the Haryana Utilities as well as considering the terms and conditions of the Tariff Regulations notified by the State Commission.

M. Aggrieved by the above Order dated 17.10.2012, on 27.12.2012 Lanco filed an Application for Directions being I.A. No. 7 of 2012 before the Hon'ble Supreme Court alleging that the State Commission had not acted in accordance with the directions given by the Hon'ble Supreme Court in the Order dated 16.12.2011 (quoted above) and accordingly stated that the State Commission has not implemented the Order of the Hon'ble Supreme Court.

N. In the above matter after hearing the parties, the Hon'ble Supreme Court vide Order dated 19.2.2013 among others, decided as under:

"I.A No. 7 of the 2012 has been filed in the appeal, inter alia, challenging the determination of Tariff by the Haryana Electricity Regulatory

> *Commission, in terms of the order passed by this Court on 16th December, 2011, directing that, without prejudice to the rights and contentions of the parties and pending further orders, the State Electricity Regulatory Commission, Haryana, would fix/approve the Tariff for sale and purchase of power for the period about which there is a dispute between Lanco and the Respondent No.3, PTC India Limited".*

O. In pursuance of the above, Lanco filed appeal being Appeal No. 65 of 2013 before the Tribunal. By Order dated 3.1.2014 the Tribunal decided the matter by allowing the appeal and setting aside the Order passed by the State Commission. This Tribunal directed the State Commission to re-determine the tariff of Unit – 2 of Lanco's power project. The Tribunal had directed Lanco to provide all necessary data and information so as to enable the State Commission to determine the claim of Lanco for increase in capital cost upon applying prudence check.

P. Pursuant to the above, Lanco filed its tariff petition being Case No: HERC/PRO-05 of 2014 with certain particulars in support of its claim for increase in capital cost in January 2014. The Haryana Utilities filed their reply, to the petition being Case No: HERC/PRO-05 of 2014filed by Lanco, in February 2014.

Q. The Haryana Utilities have challenged the judgment and order dated 03.01.2014 passed by this Tribunal in Appeal No. 65 of 2013 before the Hon'ble Supreme Court being Civil Appeal No. 3800 of 2014 and the same is pending adjudication. The Haryana Utilities participated in the proceedings before the State Commission on remand from this Tribunal, without prejudice to their rights and contentions, as raised in the Civil Appeal, pending before the Hon'ble Supreme Court.

R. The State Commission passed an order dated 25.03.2014 whereby it was decided that an independent consultant would be engaged for rendering unbiased verification of figures and cost apportionment, etc.

S. The Haryana Utilities herein filed a detailed and specific list of questions in the form of Memorandum of Interrogatories on 01.04.2014 for answers of Lanco.

T. Thereafter Ernst & Young was appointed as a technical expert by the State Commission on 09.06.2014. Ernst & Yong was required to carry out an unbiased and independent verification of figures and cost apportionment formula *to* determine the capital cost and give its report. Ernst & Young submitted a draft report on 08.07.2014.

U. It was, however, alleged that despite the fact that the consultant Ernst & Young had neither considered any of the submissions of the Haryana Utilities nor sought any views or comments from them before coming out with the draft report, the State Commission ignoring these objections adopted the draft report during the hearing held on 22.07.2014. As per directions of HERC, an addendum report of E&Y was submitted on 04.08.2014.

V. A site visit to Lanco's power plant was made on 16.08.2014 and 17.08.2014 by the staff of the State Commission, representatives of the Haryana Utilities, Ernst & Young and Lanco to have an on the spot verification & assessment of various issues. The site visit report was submitted by E&Y on 20.08.2014.

W. The State Commission passed the impugned judgment and Order dated 23.01.2015 and thereby allowed Rs.1235.28 Cr. as Net Capital Cost of Unit-2 and based thereon worked out the ad-hoc interim tariff at Lanco's Bus for supply of power from Unit – 2 to the Haryana Utilities at Rs.2.8875/kWh for the stated disputed period beginning 07.05.2011 to 31.03.2012 and Rs.2.9218/kWh for FY 2012-13.

X. The Haryana Utilities are aggrieved by the said order of the State Commission on the ground that despite the fact that there were inconsistencies in and/or insufficiency of data - information provided by Lanco, the Commission has allowed higher capital cost and in turn, higher tariff. Accordingly, their this Appeal No. 107 of 2015.

FACTS OF THE CASE IN APPEAL NO. 117 OF 2015

A. The Appellant and the Respondent No.4/PTC herein had entered into a PPA dated 19.10.2005 for the sale of 273 MW (net power output) from its 300 MW thermal Power Plant Unit – II at Pathadi, Korba, State of Chhattisgarh to the Respondent No.4/PTC at a tariff to be determined in accordance with the applicable CERC Tariff Regulations, subject to capped levelised tariff rate of Rs.2.32 per unit, for onward sale to one or more purchasers. The Appellant and Respondent No.4/PTC amended the PPA dated 19.10.2005 introducing certain amendments to the Assignment Clause in the PPA.

B. The Respondent No.4/PTC entered into a Power Sale Agreement dated 21.9.2006 (**"PSA"**) with Respondent No.2/HPGCL for sale of power purchased from the Appellant. Thereafter, in terms of the Conditions Precedent contained in Clause 3.1.1 (ii) of the PPA, the Appellant/Lanco entered into an Implementation Agreement dated 01.08.2009 with the Government of Chhattisgarh (GoCG). In terms of the said Implementation Agreement, the Appellant was to provide 35 % of the Net Power generated by the Project as home state share to the Respondent No.5 i.e. CSPTCL/Chhattisgarh).

C. Pursuant to the proceedings held on 1.10.2007 before the HERC for the approval of the PSA filed by the Respondent No.2/HPGCL, the HERC vide its order dated 31.10.2007, refused to approve the PSA, *inter alia,* on the grounds that (a) the PSA does not qualify for exemption from clause 5.1 of the Tariff Policy and (b) that the tariff pool mechanism provided under the PSA was in violation of Section 62 (6) of the Electricity Act, 2003. However, the Appellant was not a party to the said proceedings before the Respondent No.1, pertaining to the approval of the PSA and nor was the Appellant called upon to participate in the said proceedings.

D. On a Review Petition filed by Respondent No.2/HPGCL before the HERC, the HERC vide its order dated 06.02.2008 reviewed its earlier order dated 31.10.2007 and approved the PSA subject to reiterating its rejection to the tariff pool mechanism as violative of the Section 62 (6) of the Electricity Act, 2003.

E. The primary fuel i.e. coal was defined in the PPA to mean domestic coal supplied in accordance with the Coal Supply Agreement by the Coal Company. However, due to subsequent change in the Central Government's policy regarding distribution of coal, namely New Coal Distribution Policy ("NCDP"), the coal linkage was substantially reduced from the actual requirement, and the balance coal requirement could only be met by procuring from alternate sources such as e-auction, open market or imported coal, which significantly increased the generation cost up to three to five times of the Appellant. In view of the changed circumstances, the Appellant communicated to the Respondent No.4/PTC that the PPA was impossible to perform.

F. Thereafter, Respondent No.4 on 13.05.2010 filed proceedings before the HERC that the PPA was impossible to perform in view of the changed circumstances including Force Majeure events, NCDP and Implementation Agreement with Chhattisgarh Govt., and requested the

HERC to revise the tariff under the PSA. Respondent No.2/HPGCL while opposing the prayer of Respondent No.4/PTC for revision of tariff under the PSA, simultaneously, filed a petition seeking inter-alia a direction qua the Appellant and Respondent No.4 to comply with their purported contractual obligations in favor of Respondent No.2 and restraining the Appellant from selling the contracted capacity under the PSA to any third party including and not limited to the State of Chhattisgarh.

G. During the pendency of the afore-stated proceedings before the HERC and prior to the passing of the order on the said proceedings, the Appellant on account of non-fulfilment of the condition precedent contained in the aforesaid PPA, terminated the PPA vide its letter dated 11.01.2011. The PPA was terminated after the Order on the Petition filed by Respondent No. 4/PTC was reserved by the HERC on 29.10.2010 and before it was pronounced on 02.02.2011. The factum of termination of PPA was not brought to the notice of the HERC by any of the parties and therefore, was never an issue before the HERC.

H. The HERC vide its order dated 02.02.2011 dismissed the petition filed by Respondent No.4/PTC, allowed the petition filed by Respondent No.2/HPGCL and proceeded to exercise jurisdiction in respect of such PPA to restrain the Appellant from revising its price with Respondent No.4/PTC for sale of power and further restrained the Appellant from selling the contracted power to a third party.

I. Aggrieved by the directions contained in the aforesaid Order dated 02.02.2011 passed by the HERC, the Appellant filed an appeal before this Tribunal on 07.02.2011 under Section 111 of the Electricity Act,2003, being Appeal No. 15 of 2011. By way of the said appeal, the Appellant inter alia contested the jurisdiction of the HERC and, inter-alia, also challenged the conclusion of the HERC that the PPA and PSA cannot be construed as two separate agreements.

J. On 13.03.2011, Respondent No.2/HPGCL herein filed a petition being case no. HERC/PRO 6/2011 under Section 86(1) (b) and Section 86(1) (f) of the Electricity Act, 2003 challenging the termination of the PPA by the Appellant vide its letter dated 11.01.2011 before the HERC. The said proceedings were subsequently stayed by the Hon'ble Supreme Court vide its order dated 16.12.2011.

K. The Appellant also sought a stay of the Order dated 02.02.2011 by way of a separate interim application being I.A. No. 27 of 2011 in Appeal No. 15 of 2011. This Tribunal was pleased to

pass interim directions vide its order dated 23.03.2011 whereby the order dated 02.02.2011 passed by the HERC was partially stayed *inter alia* in terms of the following directions:

> *"…(c) According to the Appellant, even before the pronouncement of the impugned order dated 2.2.2011, the Appellant terminated the PPA between the Appellant and R-3 on 11.1.2011 and entered into a fresh PPA with Chhattisgarh State Trading Power Company on 12.01.2011 promising the sale of 35% of the power to the said Company, on the basis of the earlier implementation Agreement and if the impugned order is not stayed, then the Appellant will be forced to breach the said Agreement leading to withdrawal of the benefits and concessions offered by the State Government of the Chhattisgarh to the Power Projects of the Appellants, which will have a serious consequences. There is some force in this submission.*
>
> *11. Thus, we are inclined to grant interim stay of impugned order to the extent indicated above. Accordingly, the Appellant is permitted to supply 35% of power to Chhattisgarh Government Company and is directed to supply the balance power to the PTC (R-3) so that PTC (R-3) can discharge its obligation to the Power Generation Corporation (R-2) in pursuance of the PSA entered into between them.*
>
> *12. We must make it clear that we have not decided the main issues in this application as the same can be decided only at the time of final disposal of the Appeal and this interim arrangement is subject to the outcome of this Appeal."*

Vide Order dated 23.03.2011, this Tribunal did not fix any price/tariff for the supply of power despite noting that the PPA between the Appellant and Respondent No. 4/PTC stood terminated.

L. CSPTCL/Chhattisgarh also independently filed an Appeal under Section 111 of the Electricity Act, 2003 challenging the Order dated 02.02.2011 passed by the HERC being Appeal No. 52 of 2011 on the ground that the said Order contained observations and directions prejudicial to Chhattisgarh and that the said directions had been passed without Chhattisgarh having been heard in the proceedings before the HERC.

M. Pursuant to the termination of the PPA between the Appellant and Respondent No.4/PTC, the Respondent No. 4/PTC on 25.03.2011 invoked the Arbitration Clause in the terminated PPA and commenced arbitration. The said arbitration proceedings are pending.

N. This Tribunal passed its final order on 04.11.2011, dismissing Appeal No. 15 of 2011 and allowing Appeal No. 52 of 2011. This Tribunal further directed that pending the decision by the HERC on the contentions raised by Chhattisgarh State Power Trading Company, the Appellant in Appeal No.52/2011, "the interim order dated 23.3.2011 passed by us will be in force till the final order is passed by the State Commission.

O. Aggrieved by the said Order passed by this Tribunal on 04.11.2011, the Appellant filed an appeal before the Hon'ble Supreme Court under Section 125 of the Act being Civil Appeal No. 10329 of 2011 on 24.11.2011 stating that the Appellate Tribunal has erroneously upheld the exercise of jurisdiction by the HERC under Section 86(1)(b) & Section 86(1)(f) of the Electricity Act, 2003. The Appellant herein also filed a substantive interim application seeking a stay of the Order dated 04.11.2011 passed by this Tribunal in Appeal No. 15 of 2011.

P. The Hon'ble Supreme Court was pleased to pass an interim order dated 16.12.2011 on the said I.A. No. 3 of 2011 wherein the Hon'ble Supreme Court while staying the proceedings of challenge of the termination of the PPA before HERC, inter-alia passed the directions as brought out in previous paras.

Q. The afore stated order was passed in light of the peculiar facts and circumstances of the present case that the Appellant had terminated its PPA with Respondent No.4/PTC vide its letter dated 11.01.2011 i.e. prior to the order dated 2.2.2011 was passed by HERC. By an Interim Order passed by this Appellate Tribunal on 23.3.2011 (as continued by the Order dated 04.11.2011), the Appellant was directed to supply 35% of power from Unit-II of its Project to CSPTCL and the balance power to Respondent No.4/PTC. As has been stated above, this direction to supply power was passed without specifying any tariff for supply of power.

R. In terms of the liberty granted by the Hon'ble Supreme Court vide the Order dated 16.12.2011, the Appellant, on 12.01.2012 filed an application to fix/approve the tariff for the period in question i.e. for the power supplied from 07.05.2011 to 31.12.2011 and for the power proposed to be supplied during the balance period of the year 2011-12 i.e. 01.01.2012 to 31.03.2012 and for the year 2012-13 before the HERC.

S. In the meanwhile, CERC had *suo moto* issued a show cause notice to the Appellant wherein it directed the Appellant to explain reasons for not seeking the open access for injecting power into the grid and to show cause why action under section 142 of the Electricity Act, 2003 should not be taken against it for contravention of clauses (6) and (7) of the Regulations 8 of the Connectivity Regulations. Subsequently, the CERC vide its order dated 09.02.2012 held in favour of the Appellant and exonerated the Appellant from the charge of contravention of aforesaid provisions.

T. The HERC conducted hearings on 20.06.2012 and 19.07.2012 and reserved its orders. The HERC passed its order on the application to fix/approve the tariff for sale of power by the Appellant to PTC on 17.10.2012 holding that capped tariff of Rs 2.32/kWh will prevail.

U. On 27.11.2012 the Appellant filed an Application being I.A. No. 7/2012 in the pending Civil Appeal being CA No. 10329/2011 before the Hon'ble Supreme Court, inter alia, challenging the determination of tariff by the HERC and seeking quashing of the Order dated 17.10.2012 passed by the HERC.

V. The Hon'ble Supreme Court was of the view that the Order dated 17.10.2012 is an appealable Order before this Tribunal and therefore disposed of the said Application by its Order dated 19.02.2013 by giving liberty to the Appellant to file a statutory Appeal before this Tribunal against the Order dated 17.10.2012. The Hon'ble Supreme Court further made it clear that any observations made in the Order should not, in any way, influence this Tribunal, while disposing of the Appeal, if filed.

W. The Appellant challenged the Order dated 17.10.2012 of the HERC by filing an Appeal being Appeal No. 65 of 2013 before this Tribunal.

X. By Order dated 03.01.2014 this Tribunal allowed the Appeal and set aside the Order dated 17.10.2012 of the HERC. Necessary directions were issued to HERC to re-determine the tariff for Unit-II of the Appellant within two months from the date of communication of the judgment.

Y. In terms of the above referred Order of this Tribunal, the Appellant once again approached the HERC for interim tariff determination in Case No. HERC/PRO-05 of 2014 by filing its submission on 13.01.2014.

Z. On 25.03.2014 the HERC issued the following directions:-

"In the hearing held on 25.03.2014 the parties again made detailed submissions and there were wide difference of opinion between the parties on the information provided by the Petitioner regarding the plant. Accordingly, after both the parties had given their consent, the Commission Orders as under:-

i) Direction to the Petitioner (LAPL):

a. To file an affidavit certifying that the following facilities/assets (include details of the assets) which were created for LAPL Unit -1 and Unit – 2 and/or Unit -1 or Unit – 2 are not being used or will not be used for LAPL Unit – 3 or Unit – 4.

b) The following facilities/assets created for LAPL Unit -1 and Unit – 2 or for Unit – 1 or Unit – 2 are being used or shall be used for LAPL Unit – 3 or Unit – 4 jointly or separately and the amount mentioned below against each facilities/assets have been booked to LAPL Unit – 3 or Unit – 4 jointly or separately.

c) To submit the details of prudence in claiming and recovery of Liquidated Damages (LD) in terms of contract with the plant/machinery suppliers due to time over – run in commissioning LAPL Unit – 2, if any. Further, in case such claims were permissibly, the details of the amount realized may be provided.

d) To submit the terms of agreement with the auditors who have verified and certified the cost overrun claimed.

ii) Direction to the Respondent (HPPC):

a) To submit a comprehensive list of additional data/information required to the Petitioner along with a copy to the Commission within three days (LAPL to provide the details within a week).

Additionally, the Commission observes that given the fact that certain key data i.e. project cost relevant to LAPL Unit – 2, segregation/allocation of common service cost, sale of infirm power, and realization of linkage coal, submitted by LAPL which has significant bearing on re – determination of tariff was vehemently contested by the Respondent i.e. HPGCL/HPPC. Thus, all such data, as agreed by both the parties, would have to be independently verified and smoothened out by an independent Chartered Accountant (including physical verification) having exposure in power sector preferably large power plants and not in any way connected to either LAPL and/or Haryana Power Utilities. In this regard the Commission shall identify an independent Chartered Accountant (cost to be borne equally by both the parties) and subject to acceptance of both the parties appoint him to carry out the necessary verification/segregation and submit a report to the Commission within three weeks from the date of additional data/details to be made available by LAPL. The Chartered Accountant so appointed may visit the power plant, if necessary, after informing both the parties of the visit schedule".

AA. The HERC vide the above referred order dated 25.03.2014 directed that data in relation to project cost of Unit – II of the Appellant, segregation/ allocation of common service cost, sale of infirm power, and realization of linkage coal need to be verified by an independent chartered accountant identified by the HERC. Accordingly, Ernst & Young LLP (E&Y) was identified as the independent chartered accountant, which was mutually acceptable to the Appellant and the Respondent No.3 (HPPC). That from time to time the HERC directed the Appellant to the furnish information and documents to E&Y for carrying out study and investigation. Accordingly, the Appellant from time to time furnished the information and documents to the HERC and to E&Y. That after detailed study and analysis of documents and information furnished by the Appellant and based on its audited accounts, E&Y submitted its report before the HERC vide email dated 08.07.2014.

BB. During the hearing dated 28.07.2014 fixed by HERC, HERC inter alia directed E&Y to submit addendum to the report dated 08.07.2014 in light of the preliminary objections dated 25.07.2014 filed by the Respondent No.3/HPPC. Vide the said order, HERC directed that the addendum report shall be provided to the Appellant and the Respondent No.3/HPPC. HERC further directed the Respondent No.3/HPPC to file its comments/objections within two weeks from the receipt of the said addendum report and also directed the Appellant to file its reply to the said objections filed by the Respondent No.3/HPPC. Vide the said order, HERC also directed for site visit to be undertaken jointly by E&Y, representative of the Appellant, the Respondent No.3/HPPC and the officer of HERC.

CC. As per the above said directions of HERC, E&Y submitted its addendum to the report dated 08.07.2014 on 04.08.2014, which was forwarded to the Appellant and the Respondent No.3/HPPC by the HERC vide its email dated 04.08.2014.

DD. Pursuant to the directions of the HERC, a site visit comprising of the representatives of the Appellant, the Respondent No.3/HPPC, officer of the HERC along with representative of E&Y was carried on 16.08.2014/17.08.2014. Thereafter, E&Y submitted the report of the said site visit carried out on 16.08.2014 on 20.08.2014.The said site visit report was forwarded to the Appellant and the Respondent No.3/HPPC by the HERC vide email dated 23.08.2014.

EE. The Respondent No.3/HPPC before the HERC filed an affidavit dated 08.09.2014 wherein it raised its objections to the report dated 08.07.2014 and the addendum to report dated 08.07.2014 submitted by E&Y. As per the directions of the HERC the Appellant filed its reply on 17.09.2014 to the objections raised by the Respondent No.3/HPPC before the HERC.

FF. As per the directions given by the HERC in the hearing dated 19.09.2014, the Appellant filed its affidavit dated 22.09.2014 giving details and supporting documents on 23.09.2014.

GG. The HERC vide its letter dated 22.10.2014 directed the Appellant to furnish various information detailed in the said letter. The Appellant vide its affidavit dated 30.10.2014 furnished the information along with supporting documents to the HERC.

HH. The HERC vide its order dated 15.12.2014 inter alia directed the Appellant to furnish information and documents, which were filed by the Appellant on 19.12.2014.

II. Thereafter, on 22.12.2014 the order was finally reserved by the HERC in Case No. HERC/PRO-05 of 2014 and the Impugned Order was passed by the HERC on 23.01.2015.

JJ. Vide the Impugned Order, the Application seeking relaxation/variation of applicability of Regulation 16(iv)(C) of the HERC Tariff Regulations, 2008 was disposed of/dismissed by the HERC in a summary manner. The relevant findings returned by the HERC in relation to the above said application are as follows:-

"Additionally, the Commission observes that the Petitioner had filed a separate application under Regulation 33 of the HERC Tariff Regulations, 2008 praying for relaxation of Regulation 16 (iv)(c) of the said Regulations concerning O&M expenses in view of the higher actual O&M expenses incurred by them in LAPL Unit – 2. They have submitted that the actual O&M expenses now being claimed by them are lower than the normative O&M expenses admissible as per CERC Tariff Regulations, 2009 whereas the same are higher than the normative O&M expenses as per HERC Tariff Regulations, 2008. This application/petition of LAPL was also heard along with the main petition. The prayer of the Petitioner was vehemently opposed by the Respondent HPGCL/HPPC. The Commission has considered the submissions of the parties and is of the considered view that the tariff in the present case is determined as per the remand Order of the APTEL, wherein, on the issue of O&M expenses the APTEL has specifically said that "O&M expenses should be determined as per the Tariff Regulations of the State Commission". In view of the same the Commission finds no merit in the prayer of the Petitioner. Hence, petition no. HERC/PRO - 5 of 2014 is accordingly disposed of."

Aggrieved by findings of HERC in the said impugned order against its claims, the Appellant/Lanco has preferred this Appeal (No. 117 of 2015) before the Tribunal.

11. QUESTIONS OF LAW IN APPEAL NO. 107 OF 2015

As per the Appellants (HPPC/HPGCL), the following questions of law arise in the present appeal:

A. Whether the State Commission has determined the ad-hoc interim tariff for the period starting from 07.05.2011 to 31.03.2012 and for FY 2012-13, after exercising proper and effective prudence check?

B. Whether in the facts and circumstances of the case, the decision of the State Commission that there are no assets of Units 1 & 2 which are shared or will be shared with Units 3 & 4 or with Units 5 & 6, is sustainable?

C. Whether the State Commission failed to appreciate that in large generating projects of the nature contemplated by Lanco (3240MW) it would be imprudent to have separate and

independent assets like Ash Pond, Railway Siding, Water Intake System & Water Reservoir, Coal Handling Plant, Switchyard etc. for each of the generating units.?

D. Whether in the facts and circumstances of the instant case the State Commission is required to apportion costs of common and shared assets to Unit -2 (300MW) to the extent that such costs constitute not more than 10% of the total capacity of the 6 Units of Lanco, having a total capacity of 3240MW?

E. Whether the State Commission ought to have allowed the claim of some cost overruns made by Lanco despite the fact that in terms of its earlier order dated 02.02.2011, the State Commission had held that Lanco was only entitled to time extension and not entitled to any IDC and IEDC or cost overrun?

F. Whether the State Commission has rightly decided on the quantum of infirm power and realization there from to be adjusted in the capital cost?

G. Whether the State Commission fell in error in computation of energy charges for supply of power to the Haryana Utilities by considering the price of costly coal purchased from alternate sources?

12. QUESTIONS OF LAW IN APPEAL NO. 117 OF 2015

As per the Appellant (Lanco), this Appeal raises the following questions of law for adjudication:-

A. Whether the HERC has correctly applied the relevant provision of the HERC Regulations 2008 for interim tariff determination of Unit II of the Appellant?

B. Whether the HERC erred in not allowing the Application for relaxing the provisions of HERC Regulations 2008 relating to O&M Expenses submitted by the Appellant?

C. Whether the HERC has erred in not allowing/dealing with the fixed charges for the 5% power to be supplied to Government of Chhattisgarh as home state share from the same Unit in spite of the claim of the Appellant before the HERC?

D. Whether the HERC erred in disallowing certain elements/components of the capital cost which were actually incurred by the Appellant and supported by the necessary certification from the Statutory Auditor of the Appellant?

E. Whether the HERC has adopted correct methodology in computation of energy charges vis-à-vis actual cost of coal?

13. Submissions of HPPC/HPGCL in Appeal No. 107 of 2015: Requisite Prudent Check by the State Commission:

13.1 In terms of the Remand Order dated 03.01.2014 of this Tribunal, the State Commission was required to exercise proper and effective prudence check before approving the claim on Capital Cost made by Lanco.

13.2 In the impugned order, State Commission has not undertaken the requisite prudence check, The State Commission has only recorded its view either accepting or rejecting the claim of one party or the other or the consultant or the Lender's Engineer. There is no proper discussion or reasoning which is expected from a quasi judicial authority and technical expert body in regard to the determination of various tariff elements.

13.3 The data and information furnished by Lanco in the earlier Petition filed by Lanco was inadequate, insufficient and had apparent inconsistencies. The Tribunal in the judgment and Order dated 03.01.2014 had inter-alia granted another opportunity to Lanco to furnish requisite details in support of its claim for increase in Capital Cost so as to enable the State Commission to apply prudence check and re-determine the tariff.

13.4 The State Commission was required to exercise prudence check in order to ascertain not only the veracity of the claim of Lanco but also to seek whether all the capital expenditures, as claimed, had in fact been incurred reasonably or prudently, wherein, in case any such part of the capital expenditure though incurred, was not prudent or expedient, the State Commission ought to have rejected the same.

13.5 Lanco did not give full details with supporting documents as to the capital cost, the common/shared assets, the additional capitalization, quantum of sale of infirm power for the period till 6.5.2011 from Unit No. 2 etc. As a generating company it is the obligation of Lanco to satisfy and discharge the burden of proof by placing on record all the relevant particulars and on failure to provide such necessary particulars an adverse inference needed to be drawn against it.

13.6 The State Commission has mechanically relied on the conclusions and findings contained in the reports of Ernst & Young and approved the capital cost, when the said report, contrary to the terms of reference, had not carried out any independent verification and was based solely on the information provided by Lanco. Ernest & Young had proceeded to base the report on the representation given by Lanco instead of making independent assessment as per the scope of work assigned to it by the State Commission.

13.7 The State Commission has proceeded to accept and approve most of the claims regarding capital expenditure raised by Lanco, without any independent verification being carried out, either by the State Commission or by the expert consultant Ernst and Young, appointed by it.

13.8 The need to exercise prudence check by the State Commission, notwithstanding any approval of the capital cost by the Central Electricity Authority or by the Auditors etc., is now well settled. In the case of West Bengal Electricity Regulatory Commission v CESC (2002) (8) SCC 715 the Hon'ble Supreme Court held as under:

> *"96.The High Court further came to the conclusion that in view of the fact that there is no challenge to the accounts of the Company by the consumers, the said accounts of the Company should be accepted by the Commission. Here again we are not in complete agreement with the High Court. There may be any number of instances where an account may be genuine and may not be questioned, yet the same may not reflect good performance of the Company or may not be in the interest of the consumers. Therefore, there is an obligation on the Commission to examine the accounts of the Company, which may be genuine and unchallenged on that count still in the light of the above requirement of Section 29(2)(g) to (h). In the said view of the matter admitting that there is no challenge to the genuineness of the accounts, we think on this score also the accounts of the Company are not ipso facto binding on the Commission. However, we hasten to add that the Commission is bound to give due weightage to such accounts and should not differ from the same unless for good reasons permissible in the 1998 Act."*

Similarly, in the case of Kerala State Electricity Board v Kerala State Electricity Regulatory Commission, Appeal No. 177 of 2009 dated 13.1.2011 this Tribunal held as under:

> *"20. At the outset, it shall be stated that the State Commission while examining the accounts is not bound by the audited accounts. The accounts may be genuine as per the Auditor's Report. But, it is the State Commission which has to examine the accounts to ascertain the performance of the licensee in relation to the desirability of the expenditure in the interest of the consumers. This point has already decided by the Judgment of this Tribunal in Appeal No. 94 of 2008 as well as the decision of Hon'ble Supreme Court in West Bengal Electricity Regulatory Commission vs. CESC Ltd. (2002) (8)SCC 715.*
>
> *21. Let us refer to the relevant observations made by this Tribunal in Appeal No. 94 of 2008:*
>
> > ***"In the truing up process the actual expenditures are examined and the expenditure with various heads are trued up. So far as the effect of audit is concerned, it establishes the genuineness of accounts and expenditure incurred. The Commission has to allow only as much expenditure as pass through as meets the targets set by it or is found to be prudent and necessary"***
>
> *22. This decision was given by this Tribunal on the strength of the ratio decided by Hon'ble Supreme Court. We will now refer to the relevant observations made by the Hon'ble Supreme Court in the decision referred in (2002) (8) SCC 715.*

"In this process, the Commission, in our opinion, is not bound by the Auditors' Report….. There may be any number of instances where an amount may be genuine and may not be questioned, yet the same not reflect good performance of the company or may not be in interest of the consumers. Therefore, there is an obligation on the Commission to examine the accounts of the company which may be genuine and unchallenged on that count still in the light of the above requirements of Section 29(2) (g) to (h). In the said view of the matter admitting that there is no challenge to the genuineness of the accounts, we think on this score also the accounts of the company are not ipso facto binding on the Commission."

23. The above observations would reflect the ratio decided by Hon'ble Supreme Court. What is to be seen in this Appeal where each item of expenses allowed or disallowed by the State Commission is correct or not in the facts of the case and the materials placed before of the Commission."

13.9 The principles to be applied in such cases of risk allocation on account of delay in commissioning of the projects, are as laid down by the Tribunal in Maharashtra Power Generation Company Limited -v- Maharashtra Electricity Regulatory Commission and Others (Judgment dated 18.1.2013 passed in Appeal No. 57 of 2012 (Paras 7.4 & 7.5 of the judgment).

13.10 The consultant - Ernst & Young, contrary to the specific terms of reference, did not carry out any independent verification of the information provided by Lanco. The reports merely accepted the statements and information provided by Lanco and drew a presumption in favour of its accuracy. Furthermore, despite the specific objections of the Haryana Utilities, the State Commission proceeded to adopt a draft report submitted by the said consultant which had not even dealt with any of the submissions of the Haryana Utilities nor asked its views or comments prior to publication of the said report.

13.11 The "Disclaimer" given by the Consultant, E&Y, in the Draft Report submitted by them to the State Commission on 08.07.2014 clearly shows that the report should not have been considered as representing the truth and without further prudence check to be applied.

13.12 The Ernest & Young had apparently, not carried out the necessary prudence check and has even disclaimed any responsibility for the work undertaken.

13.13 Despite the repeated opportunities available with Lanco for placing necessary particulars, Lanco also did not seek to remove the inconsistencies or furnish or fully disclose necessary data and information in support of its claim for increase in capital cost. The limited and skewed information provided by Lanco, has been accepted at face value, without proper

scrutiny. In the circumstances, adverse inference in terms of section 114 of the Evidence Act should have been drawn against Lanco on account of inconsistencies and insufficiency of data.

13.14 The State Commission failed to appreciate that the expenditure being supported by accounting vouchers for the purpose of the Companies Act, are not sufficient. The Generating Company i.e., Lanco, was required to establish: (a) the need for capital expenditure; (b) incurring of such capital expenditure in a structured manner; and (c) the total expenditure being reasonable and just.

13.15 The higher capital cost and higher tariff elements allowed without effective prudence check would unreasonably increase the retail supply tariff and adversely affect the consumers in the State of Haryana, at large.

13.16 The State Commission has proceeded to decide the tariff issues without undertaking the requisite prudent check and by mechanically following the report of the Consultant- Ernst and Young and in turn the said Consultant has mechanically adopted the submissions of Lanco.

(a) The State Commission had appointed Ernst and Young as the Consultant in terms of the order dated 25.03.2014 stating '*Moreover, it was felt that, with the consent of both parties, external help shall be required to have an unbiased verification of figures and cost apportionment formula which may even require visit to the LAPPL power plant.*'

(b) E&Y Consultants were required to undertake a professional job of investigating and going thoroughly into the veracity of claim of Lanco. E&Y Consultant, as it is clear from the opening part of the report given by them, had done only the function of collating the data mostly from Lanco and some from other sources and without undertaking the prudent check required for giving an independent and unbiased view. The Report of E& Y.

(c) E&Y had not considered the specific objections with details given by the Appellant. Firstly, E&Y did not even have any deliberation with the Appellant before giving the report. Secondly, during the site visit on 16-17.08.2014 and thereafter, the Appellant had pointed out the specific aspects to be considered in regard to the sharing of common assets, infirm power, IDC and IEDC, prudent check of capital expenditure etc. These aspects have been set out in detail in the Note of Arguments dated 19.09.2014 and Response dated 02.01.2015.

(d) E&Y also did not disclose the conflict of interest it has in the matter having advised Lanco Group. This aspect was also pointed out to the State Commission. E & Y was appointed for the specific purpose to give an unbiased and independent report. It is

not disputed that the Haryana Utilities agreed to the suggestion of the State Commission for appointment of E & Y. However, in the letter-dated 29.04.2014 (quoted in the summary of events herein above) addressed by the Haryana Utilities to the State Commission, it has been specifically stated that the State Commission should ensure independence of E & Y. It is not that the Haryana Utilities did not raise the aspect of conflict of interest in the beginning. It was for the State Commission to have taken the requisite disclosure from E & Y before appointing them to avoid conflict of interest.

(e) In this regard, the affidavit dated filed by E & Y before the State Commission dated 25.08.2014 is vague and an attempt to divert by adding qualification to the conflict of interest. It will be anomalous to say that E & Y will deal with the Lanco Group as a whole excluding Amarkantak and thereby claim that there is no conflict of interest. Further, E & Y has qualified undertaking by stating that in its judgment there is no conflict of interest. The conflict of interest was to be judged objectively by the State Commission and not leave it to the subjective decision of the E & Y, particularly, in the context of the serious objections raised by the Haryana Utilities.

(f) The conduct of E & Y in the proceedings also shows the bias in favour of Lanco. In any event, the conduct shows that E & Y decided to simply go by what Lanco says, ignore what the Haryana Utilities were representing, conduct no enquiry or investigation and just furnish the report. This is clear from the fact that E & Y, in the first instance, did not consider it necessary to make a site visit and enquire about the common assets. E & Y give the draft report without the site visit, without inviting the Haryana Utilities to comment on their draft report and without any detailed investigation. The common assets could be ascertained precisely only by the site visit.

(g) E & Y wanted to close their investigation with the draft report. Haryana Utilities, which raised the specific objections and sought for the site visit. The site visit was ordered by the State Commission at the instance of the Haryana Utilities.

14. Submissions of Lanco in Appal No. 107 of 2015:

Requisite Prudence Check by the Commission

First Tariff Order

14.1 In the first round of tariff determination which was carried out by the Commission pursuant to the direction issued by the Hon'ble Supreme Court vide Order dated 16.12.2011, and which culminated into the Tariff Order dated 17.10.2012, HPPC had raised certain objections to the Tariff Application filed by LAPL, which are recorded in Para 4.1 of the Order.. One of the objections was that *"Information required as per the Regulations not given"*. The other was that *"Petitioner has not provided details of common facilities"*. Another objection was that *"Petitioner has not furnished details of infirm power sales.* There was no particular or specific objection raised by HPPC, nor any particular

information, detail or data was sought by HPPC, apart from repeatedly alleging that the data furnished by LAPL was inadequate, insufficient and inconsistent.

14.2 The Commission proceeded to determine the tariff on the basis of capital cost indicated in draft Detailed Project Report for Unit-II prepared at the time of planning of the Unit. The Commission completely disregarded the actual capital cost incurred on the Unit as on the date of completion of the project (i.e. Commercial Operation Date), which is the capital cost relevant for the purpose of determination of tariff as per the Tariff Regulations (HERC Tariff Regulations 2008 or CERC Tariff Regulations 2009). Even after determining the tariff, the Commission held that the capped tariff of Rs 2.32/kWh provided in the PPA would prevail as the Hon'ble Supreme Court in its Order dated 16.12.2011 had not directed the Commission to ignore the PPA while determining the tariff.. The Order of the Hon'ble Supreme Court for determination of tariff was thus, sought to be frustrated by the Commission.

<u>APTEL's judgment dated 03.01.2014</u>

14.3 The said Order of the Commission was set aside by the Tribunal vide judgment dated 03.01.2014 in Appeal No. 65/2013 filed by LAPL and the matter was remanded to the Commission for re-determination of tariff afresh, *dehors* the PPA, within two months of the date of receipt of the Order by the Commission.

14.4 As regards prudence check for determination of capital cost by the Commission, this Tribunal observed in Para 62 of the Order that *"we find from the impugned order that adequate materials were not available before the State Commission to verify the capital cost incurred on Unit No. 2 of the Appellant and to examine that the cost overrun was not due to reasons attributable to the Appellant and in the absence of the requisite materials the State Commission approved the capital cost as per the Detailed Project Report."* Nowhere in the Order did the Tribunal hold that LAPL had defaulted in placing relevant material on record, as sought to be contended by HPPC in the present proceeding. The observation of the Tribunal in Para 62 of the judgment is thus to be considered in light of Para 7of the submissions above.

14.5 Vide judgment dated 03.01.2014, this Tribunal directed LAPL to submit the necessary details of capital cost for Unit No. 2 including apportionment of cost of common facilities and detailed reasons for the time and cost overrun to enable the Commission to apply

prudence check and determine the capital cost according to its own Tariff Regulations i.e. HERC Tariff Regulations 2008.

<u>Second Tariff Order (Impugned Order)</u>

14.6 In the second round of tariff determination pursuant to judgment dated 03.01.2014 of this Tribunal, LAPL supplied the relevant details, information as well as documents, to the Commission vide submission dated 13.01.2014. The details of apportionment of common facilities shared between Unit-I and Unit-II were also supplied. The details of time and cost overrun were also explained in the Appeal along with supporting documents.

14.7 Inasmuch as the tariff was to be determined as per HERC Tariff Regulations 2008, the relevant regulation for determination of Capital Cost is Regulation 12. Regulation 12(1) states that *"the actual expenditure incurred on the date of completion of the project shall form the basis for fixation of tariff."* LAPL produced the Statutory Auditor's certificate certifying the actual capital cost incurred upto the date of completion i.e. the date of declaration of Commercial Operation of Unit-II which was 07.05.2011, as required under Regulation 12 of the HERC Tariff Regulations 2008. Although objections were raised to the Auditor's certificate as well before the Commission, HPPC has not pursued the same and no argument was made on the same, before this Tribunal in the present proceeding.

14.8 In reply dated 10.02.2014 filed by HPPC to LAPL's submission dated 13.01.2014,in response to capital cost claimed by LAPL based on the Auditor's certificate and detailed reasons given for cost overrun, HPPC vaguely assailed the Auditor's certificate in Paras 10 & 11 thereof on the sole ground that it contained disclaimer. After citing judgments of Hon'ble Supreme Court and this Tribunal on prudence check in Paras 13 and 14 of its reply, it culled out the principles laid down in the said judgments in Paras 15, 16 and 17 of the reply. Apart from above, HPPC failed to raise any specific objection *qua* the information and documents furnished by LAPL as regards the capital cost incurred by it. Even in the present Appeal, apart from pointlessly repeating the importance of principles of prudence check and alleging that the Commission has not conducted prudence check and the information and details given by LAPL were incomplete, inadequate and inconsistent, HPPC has failed to pin point any specific issue or objection as regards the capital cost incurred by LAPL. As stated, the allegation regarding disclaimer in Auditor's Certificate has been given up and not argued before this Tribunal.

14.9 Admittedly, HPPC did not file any response, did not raise any objection nor did it ask for any clarification either to LAPL's reply to the memorandum of interrogatories or to the affidavit filed by LAPL in terms of the Order dated 25.03.2014.It is not the case of HPPC either before the Commission or even in the present Appeal that the information given by LAPL pursuant to the Order dated 25.03.2014 of the Commission was insufficient, incomplete or inadequate, as it was previously. Now, the objection raised by HPPC is that the information was inconsistent. Also, no reply was filed by HPPC to the affidavit filed by LAPL regarding sharing of common assets.

14.10 In the hearing held on 25.03.2014, the Commission felt that there was a need of external help from an Independent Chartered Accountant to have unbiased verification of figures and cost apportionment formula, in view of the contest being made by HPPC. Accordingly, with consent of the parties, the Commission agreed for appointment of an Independent Chartered Accountant having exposure in power sector preferably large power plants and not in any way connected to either Lanco Amarkantak Power Ltd. and/or Haryana Power Utilities. It is important to note that the task of identifying an independent Chartered Accountant was undertaken by the Commission itself and the Commission did not invite any proposal or sought suggestion from either of the parties. The Chartered Accountant was to be appointed subject to acceptance of both the parties. It was further envisaged and is so recorded in the order that the Chartered Accountant shall submit a report to the Commission within three weeks from the date of additional data/details to be made available by LAPL.

14.11 The Commission held a hearing on 20.05.2014 especially for taking consent of the parties on appointment of Ernst &Young LLP (E&Y)who was selected by Commission itself. In the hearing representatives of LAPL, HPPC and E&Y were present. Representatives of both the parties i.e. LAPL and HPPC gave their consent to appointment of E&Y. This is so recorded in **Para 7.3** of the impugned order.

14.12 E&Y was thus appointed with consent of the parties, and proceeded with the scope of work assigned by the Commission and submitted a draft report on 08.07.2014. At no point in time prior to submission of the report, HPPC objected to or raised any issue as regards the appointment of E&Y. The said draft report was forwarded by the Commission on 09.07.2014 itself to the parties to invite their comments/objections within 7 days thereof. Whereas LAPL filed its objections to the report, HPPC admittedly did not raise any

objection to the report within the time period prescribed and raised objection belatedly. LAPL also filed its written submission on 25.07.2014.

14.13 A hearing was held by the Commission on 28.07.2014 wherein HPPC raised the issue of conflict of interest of E&Y with Lanco Group. The objection was raised in an utterly vague manner and is recorded in Para 1.12 of the impugned order. Thus, it was only post submission of E&Y's report, HPPC raised the issue of alleged conflict of interest.

14.14 It is important to note that neither before the Commission nor before this Tribunal, HPPC has raised any specific issue or has given any specific instance to impeach the credibility of E&Y as an Independent Chartered Accountant or to challenge the independence of E&Y. No material, evidence or document whatsoever of any kind, has been placed on record either before the Commission or before this Tribunal which would indicate that E&Y has conflict of interest with the LAPL or was not independent and was biased in favour of LAPL. Allegations are being made by HPPC against E&Y in a highly irresponsible manner. After having consented to appointment of E&Y and having found that the report was not to their liking HPPC, as an afterthought raised the issue of conflict of interest only in the hearing held on 28.07.2014, much after receipt of the draft report.

14.15 Nonetheless, the Commission directed E&Y to file an affidavit to put the controversy at rest. The officials of E&Y, who had conducted the exercise and prepared the report and were acting in a completely professional manner, were made to file an affidavit to counter the vague allegation of conflict of interest levelled by HPPC.

14.16 The affidavit was duly filed. The Commission recorded its satisfaction as regards the said affidavit. The Commission further rightly observed in Para 7.3 of the impugned order that *"E&Y and for that matter any big consultancy firm may have handled some business/services for a firm for consideration in the past but once all such transactions are closed, there do not seem any justification to apprehend existence of any conflict of interest. It is evident from the affidavit now submitted by E&Y that that EY LLP had no conflict of interest with LAPL Amarkantak Power Limited at the time of signing the contract with the Haryana Electricity Regulatory Commission i.e. on 9th June, 2014."*

14.17 HPPC is now trying to find shortcomings in the affidavit by stating that the person affirming the affidavit has made it conditional by using the expression *"to the best of my knowledge"* and by stating *"in any manner so as to affect the independent of EY LLP in*

relation to performing services mentioned in the contract dated 09th June, 2014 with Haryana Electricity Regulatory Commission".

14.18 The misconceived nature of the objection is apparent. An affidavit is always sworn by the Deponent *'to the best of knowledge of the deponent'*. Further by explaining that E&Y has no connection with LAPL Amarkantak Power Ltd., which was the party before the Commission and whose tariff was being determined, so as to affect its independence, E&Y has specifically denied the allegation of conflict of interest which would result in any kind of bias in favour of LAPL.

14.19 HPPC's further objection is that this amounts to qualifying the statement and conflict of interest is to be judged objectively by the Commission. Admittedly, the HPPC has failed to bring on record any material or shred of evidence to show that E&Y has any conflict with LAPL or even with Lanco Group. How does HPCC expect the Commission or this Tribunal adjudicate on a contention which is a figment of its imagination and is wholly unfounded, unsubstantiated and misconceived. The Order dated 25.03.2014 records that the Chartered Accountant should not be connected either to LAPPL and/or Haryana Utilities. This Order was passed with the consent of parties. The affidavit of E&Y is therefore is in line with the Order. HPPC's insistence that E&Y should have given an affidavit as regards 'Lanco Group's is not only contrary to it consent recorded the Order dated 25.03.2014 but is otherwise misconceived inasmuch as the tariff was being determined of Lanco Amarkantak Power Ltd., which is one of several companies (around 100) of Lanco Group. Advisedly the Order refers to LAPL and Haryana Power Utilities and not Government of Haryana. In any event, HPPC has failed to bring any material on record to even remotely substantiate its allegation of conflict of interest of E&Y with Lanco group.

14.20 The parties had agreed on 25.03.2014 (as recorded in the Order of the Commission) that a Chartered Accountant having exposure in power sector preferably large power plants should be appointed by the Commission. The Commission has appointed one of the top four Chartered Accountancy firms. The integrity of E&Y cannot be doubt on the basis of vague allegations made by HPPC. E&Y is 150 year old firm with presence in 70 countries and more than 2,50,000 employees. If the test of conflict of interest as propounded by HPPC i.e. on the basis that E&Y may have had business transaction with some company of LAPL Group is to be applied then any Chartered Accountancy firm or any advisory firm

would have conflict of interest with any entity inasmuch as it would always want to favour the private party with an objective to get more work.

14.21 HPPC has further contended that it had addressed a letter dated 29.04.2014 to the Commission stating that it may be ensured that E&Y should not be associated in any form with Lanco Group. However, HPPC has failed to establish as to how the independence of E&Y was compromised by substantiating its allegation of conflict of interest.

14.22 It is also important to note that though E&Y was represented before the Commission, it is not a party before this Tribunal. Inspite of making allegations against E&Y in the present report to impeach its credibility and making an attempt to invite findings from this Tribunal, HPPC has chosen not to implead E&Y as party to the present Appeal. Any finding qua E&Y thus would be in breach of principles of natural justice.

14.23 Another contention raised by HPPC is that E&Y did not have any deliberation with HPPC nor did it consult HPPC during preparation of the report. This is utterly misconceived because as per the Order dated 25.03.2014, LAPL was to furnish the data and details to E&Y and within 3 weeks of receipt of the same, report was to be furnished by E&Y to the Commission. No data or information was to be furnished as such by HPPC nor did HPPC furnish any data or information to E&Y. HPPC has not even pointed out that it wanted to submit certain information to E&Y, however, it did not do so as E&Y did not ask for it. Allegations are thus being made as an afterthought. The Order dated 25.03.2014 of the Commission did not provide for any discussion, deliberation etc. with the parties or to take into consideration the views/objections etc. of the parties during the time of preparation of the report and rightly so. In an exercise of this nature, once the report is prepared by the Consultant, the parties are given full opportunity to furnish its views/comments/objections to the report. In this case as well, the Commission vide e mail dated 09.07.2014 furnished the report to the parties immediately on receipt of the same on 08.07.2014. No reasons were furnished by HPPC as to why deliberation with them by E&Y was necessary while preparing the report. If such a course was adopted by E&Y, then it would have turned itself into an adjudicatory body, which was not the scope of their work and which could not have been their function. Further, if HPPC was so very concerned with the approach adopted by E&Y or if HPPC wanted to furnish any information to E&Y, it could have approached E&Y at any stage, which it never did. All questions raised in Memorandum of Interrogatories were answered by LAPL. No further questions were asked or clarification

sought on the answers given by LAPL. Therefore, to now raise baseless allegations that E&Y did not conduct an unbiased exercise and favour LAPL is unfortunate and uncalled for.

14.24 The other objection raised by the Appellant to E&Y's report is that it contains disclaimers. A perusal of the Disclaimer would reveal that the disclaimers are general in nature, which any report of this nature prepared by any professional would contain. The purpose and objective of disclaimer is to insulate oneself from a possible legal action by any of the parties. E&Y has acted in a professional capacity and like any other professional it would not like to expose itself to any claim by either of parties and has therefore given disclaimer in the report. The disclaimer has to be read as a whole and not in a selective manner as sought to be done by HPPC.

14.25 It is lastly important to note that in the present Appeal, a feeble challenge has been made by HPPC – Facts in Issue to the following effect:-

> *"Messers Ernst & Young had not conducted the independent enquiry properly and is also affected by conflict of interest in favour of LAPL."*

14.26 There is not even a single ground in the Appeal challenging the order of HERC on the alleged issue of conflict of interest. There is no specific challenge raised by HPPC. It is reiterated that before the Commission also, HPPC had not raised any specific challenge to E&Y appointment and had only made vague and unspecific allegations. Thus, there is no merit whatsoever in the objection raised by HPPC on the ground of alleged conflict of E&Y.

14.27 Apart from stating that E&Y has not carried out an independent verification and has proceeded to base the report on the representation given by LAPL instead of making independent assessment, HPPC has not pointed out any specific issue as regards any flaw or errors in the E&Y report. HPPC emphatically states that the information provided by LAPL was not complete and skewed without pointing out which information it is referring to.

14.28 As far as applying the prudence check as regards the need for capital expenditure and the expenditure being reasonable as required under Regulation 12 of the HERC Regulation 2008, if the allegation of HPPC that the Commission had not applied the prudence check is correct, the Commission would not have deducted a huge amount of Rs 121.37 crores from the final capital cost as incurred by LAPL and certified by the Auditor. This is without

prejudice to LAPL's contention that such deduction was erroneous and wrongful and has therefore been challenged in Appeal No. 117/2015.

14.29 Repeatedly it was argued by HPPC that E&Y has mechanically relied upon the information given by LAPL and Commission has mechanically relied upon the findings and conclusion of E&Y. It is further contended that the Commission has proceeded to accept and approve the claims regarding capital cost without independent verification being carried out by E& Y or the Commission. As to which claim has been accepted wrongly and how has E&Y failed to carry out independent verification is not pointed out specifically at all by HPPC.

14.30 In this regard it is submitted that the certificate furnished by the Statutory Auditor certifies the actual cost incurred. Such certificate was duly furnished. The prudence check on the cost overrun has been applied by the Commission itself as is evident from the impugned Order. It is while exercising prudence check only, the Commission has made huge deductions from the capital cost certified by the Auditor by stating that the cost was not incurred prudently, the Commission has recorded as follows:-

> *"7.4 In addition to the above E&Y submitted addendum to their report as well as undertook site visit and submitted a report on the same. Further, as already stated, E&Y also replied to various queries of the Commission in respect of capital cost, coal cost etc made vide e-mail dated 31.10.2014 and note to the clarifications furnished in response to the additional queries of the Commission. In view of above and to address the apprehension of HPPC in this regard, the Commission would like to make it very clear that report submitted by E&Y has been just another input for determination of tariff amongst a large number of inputs received in the Commission in the form of pleadings (both written & oral) in a number of hearings held in the present case. Consequently, the Commission was bound to apply its own mind including prudence check to all the claims of LAPL and records available in the Commission rather than base its judgment solely on the report submitted by E&Y. Further the Commission did satisfy itself in the hearing held on 28.07.2014 that E&Y carried out the assignment in accordance with the scope of work as per the contract and further directed E&Y to submit an addendum in respect whatever doubts/quarries that still remained as well as to undertake site visit which was complied with by E&Y as already stated above."*

14.31 Further, in **Para 7.6** of the impugned Order, the Commission has recorded as follows:-

> *"7.6 Before proceeding further, the Commission observes that the time granted by the APTEL for passing the Order in the present case was two months from the date of communication of the said judgment. However, due to complexity of the case and disputes raised by the HPPC on the details/data provided by LAPL for re-determination of tariff in the present case, the Commission sought some more time from the APTEL. The APTEL was pleased to grant time till 25.06.2014. However, due to the need subsequently felt by the Commission for independent verification of the data/details, which was got done by*

appointing independent consultant M/S E&Y, site visit as well as adjournments sought by the parties, the matter got further delayed beyond the extended time allowed to the Commission by the APTEL. It was, however, essential for the Commission to first satisfy itself regarding the authenticity of the voluminous data/details running into several hundred pages filed by the parties which formed the basis for tariff determination and then only proceed further to avoid any factual/computational error and further litigation, hence the delay……………"

14.32 The judgments cited by HPPC on prudence check lay down the principle that even if the Auditor certifies the cost as having been genuinely incurred, the prudence behind incurring the cost is to be ascertained by the Commission. Hon'ble Supreme Court in *West Bengal Electricity Regulatory Commission v CSEC (2002) 81 SCC 715* held that *"However, we hasten to add that the Commission is bound to give due weightage to such accounts and should not differ from the same unless for good reasons permissible in the 1998 Act."*

In the present case, the Statutory Auditor's certificate certifies that Rs 1,168.37 crores was incurred on Unit-II. There is no challenge as far as the genuineness of the said amount having been incurred is concerned. The entire challenge laid by HPPC right from the beginning is the prudence in incurring the said amount. As regards the prudence in incurring the said amount, the Commission has conducted a detailed exercise. The task of prudence check was conducted by the Commission itself in the impugned order. HPPC is thus pointlessly assailing the impugned order on a completely fallacious premise that the Commission has not conducted prudence check and has mechanically relied on the report of E&Y.

15. Submissions of HPPC/ HPGCL in Appeal No. 107 of 2015:

Apportionment of Common Assets

15.1 There are common (shared) assets among the six units of Lanco, having a total capacity of 3240MW. The capacity of Unit 2 being 300 MW, constitutes not more than 10% of the total capacity. Therefore, the costs of such common facilities may be apportioned to Unit -2, only to the extent of not more than 10%. Without prejudice to the above even if Units 5 and 6 are ignored there is no basis for not taking into account the development of Units 3 & 4 at the same place and work of the share if Unit 2 with 300 MW against 1920mMW of aggregate capacity I.e. 15.62% for cost allocation of assets which should be commonly used for economies of scale and reduction in capital cost.

15.2 It would be imprudent on the part of any generating company including Lanco to have separate and independent assets like Ash Pond, Railway Siding, Water Intake System & Water Reservoir, Coal Handling Plant, Switchyard etc. for each of the generating units. When several generating units at the same site are planned, the principle of economies of scale is to be applied and implemented.

15.3 The State Commission has wrongly held that there are no common assets of Units 1 & 2 which are shared or will be shared with Units 3 & 4.

15.4 Haryana Utilities had provided a comparative sheet of such common assets including Ash Pond, Railway Siding, Water Intake System & Water Reservoir, Coal Handling Plant, Switchyard, Colony, Roads, Administrative Building, Service Building, Air Conditioning and Ventilation System, Compressor System, Fire Station, Repair and Maintenance Workshop, Cooling Towers, Rain Water Harvesting, Field Hostel and Drainage System. It was submitted that these assets are bound to be and should be planned as common and/or likely to be shared between Units 1 & 2 and Units 3 & 4 as well as Units 5 & 6**.**

15.5 The Haryana Utilities had in response to the claim of Lanco that there are no common assets, submitted that it would be imprudent on the part of Lanco to have all the above assets as separate and independent for each of the generating units. It was submitted that when several generating units at the same site are planned, the principle of economies of scale is to be applied and implemented. However, without appreciating the nature of submissions, the State Commission has erroneously held that the stand of the Haryana Utilities on the issue of common assets was contradictory.

15.6 As against the detailed submissions made by the Haryana Utilities on the issue of common facilities based on the layout plan and site visit, Lanco did not place any credible document or material to rebut the same. The State Commission has failed to exercise prudence check and apply its independent mind on the issue.

15.7 The State Commission has not given any finding on the above important aspect and instead preferred to accept the assertions made by Lanco in its Petition and affidavit dated 09.04.2014 and E & Y report which referred to Lanco assertion that there that there are no common facilities. The State Commission rejected the contention of the Haryana Utilities solely on the basis of presumptions and probabilities and by blindly accepting the conclusions of the consultant, Ernst & Young, without any independent verification at its end.

15.8 Lanco had primarily referred to different approvals granted for each of the generating units by various authorities including environmental approval, approval for drawing water, railway authorities approval etc., to allege that there are no common assets/shares assets. The grant of specific and/or separate approval for each unit did not mean that each of the

unit will have an independent and separate asset and/or that there will be no common assets. Lanco's submissions were made solely with a view to confuse the matter and conceal the fact that physical assets will be common. The site visit and layout plan had exposed the falsity of the claim of Lanco, however, the State Commission failed to draw an adverse inference against Lanco.

15.9 In terms of Section 61, the principal objective is to safeguard the interest of the consumer and only reasonable cost should be allowed to the Generator. Accordingly, the prudent check is necessary. If there are number of generating units being commissioned in a progressive manner, it is necessary to apportion the capital cost pertaining to shared assets in proportion to the MW capacity. Reference in this regard may be made to the judgments of this Tribunal in the following cases:

A. THDC India Limited –v- Central Electricity Regulatory Commission (Order dated 29.05.2015 passed in Appeal No. 103 of 2014)**.**

B. M/s Raj West Power Limited, Jaipur –v- Rajasthan Electricity Regulatory Commission, Jaipur and Ors. 2012 ELR (APTEL) 0069.

15.10 The shifting stand taken by Lanco in response to Haryana Utilities' submissions on common/shared assets, since inception, and at different stages of the proceedings before the State Commission and before this Tribunal is summarised as under:

(a) The stand of the Haryana Utilities in the reply dated 10.03.2014 before the State Commission was as under:

"8. The Respondent No.2 submits that the generating station of Lanco planned to be established at Amarkantak consist of two units of 300 MW each and two Units of 600 MW each aggregating to 1920 MW. The answering Respondents have to get power from only the Generating Unit No. II of 300 MW. The Generating Unit No.II constitute only 15.62% of the total capacity of the generating station. There are number of common facilities including the Land, Service Buildings, MGR Workshop Building, Off Site buildings, Administrative buildings, Field Hostel, Residential and Service Buildings, Townships, Boundary Wall, Sewerage and Efficient Treatment Plants, Power Station Switchyard, Air-conditioning System, Coal Handling System, Permanent Roads, Drains, Rain Water Harvesting, Fire Station and related expenditure, Fuel Oil and Ash Handling System and various other assets which are related to all the generating units and is not restricted to Unit No.2 or for that matter Units 1 & 2 alone. Since these and other common facilities relate to the entire project of 1920 MW, the cost of which common facilities to the extent of 15.62% alone can be apportioned to Unit No. 2 as per the practice prevalent including the terms of the Tariff Regulations notified by the Central Commission.

9. In the petition filed, Lanco has not furnished the requisite details in regard to the common facilities. Lanco has only apportioned the common facilities

amongst Units 1 & 2 without considering the impact of such common facilities qua Units 3 & 4 of 600 MW each. The apportionment between Units 1 & 2 is also in an arbitrary manner undertaken at the whims of Lanco. There is no Auditor's Certificate verifying the apportionment or the basis of apportionment.

(b) The stand taken by Haryana Utilities in their Memorandum of Interrogatories

"2. In the proceedings, Lanco has not furnished the requisite details in regard to the common facilities sale of power before the COD and also the Force Majeure Events. Lanco has only apportioned the common facilities amongst Units 1 & 2 without considering the impact of such common facilities qua Units 3 & 4 of 660 MW each. The apportionment between Units 1 & 2 is also in arbitrary manner. There is no Auditor's Certificate verifying the apportionment or the basis of apportionment."

(c) The stand taken by Lanco in the Reply dated 07.04.2014 filed to the Memorandum of Interrogatories:

"In so far as apportionment of common facilities is concerned, the Petitioner has time and again stated and is again reiterating that there are no common facilities between Unit-I and Unit-II on the one hand of Unit-III & Unit-IV on the other hand. It is reiterated that Unit-III & IV (2x660MW) are being set up separately from Unit-I & Unit-II and the said Units are in construction phase and are expected to be commissioned in FY 2015-16 whereas Unit-I & Unit-II are already operational. It is reiterated that Unit-I was conceptualised, planned and achieved financial closure on 20.09.2005 much prior to financial closure of Unit-II. Further, Unit-II has been appraised separately by the lenders and its financial closure happened on 15.09.2006 i.e. about one year after the financial year closure of Unit-I. It is noteworthy that the two Units i.e. Unit-I & Unit-II were separately conceptualized, appraised and executed by augmentation/modification/ addition to the existing facilities of Unit-I. The details of the common facilities of Unit-I & Unit-II and their respective cost incurred along with a brief explanation note as well as Auditor's certificate dated 18.02.2014 are already on record. It is submitted that since there are no common facilities between Unit-I & Unit-II on the one hand and Unit-III & Unit-IVs on the other hand. Therefore there is no impact on any facility qua Unit-III & Unit-IV as alleged by HPGCL.

It is denied that the apportionment between the Unit-I & Unit-II is undertaken in arbitrary manner at the whims of the Petitioner as alleged or otherwise. In this regard, it is submitted that the cost incurred on common facilities is true and correct and as per the books and records of Petitioner Company.

(d) The stand taken by the Haryana Utilities in the Affidavit dated 08.09.2014 after the site visit **–**

9. Without prejudice to the above during the site visit on 16th and 17th August 2014, the representatives of Respondent No.2 became aware of serious inconsistencies in the claim made by the Petitioner that there are no common or shared assets whatsoever in regard to Units 1 & 2 with Units 3 & 4 of Amarkantak Power Project. Some of these inconsistencies are being summarised herein below:

a) ***Layout Plan*** *: It is submitted that the Petitioner provided the representatives of the Respondent No.2 with a combined layout plant of Unit Nos. 1 to 4. However, the said Layout Plan has not been properly marked/labelled. The layout plan is provided by the Petitioner for Units 1 to 4 and the layout plant for Unit 1 & 2 are collectively annexed hereto and marked.*

b) ***Land :*** *Land of Unit Nos. 1 to 4 was not properly demarcated. Further, land of Unit Nos. 3 & 4 could not event be separately identified. It is submitted that part of the land Unit Nos. 1 & 2 has been used for Unit Nos. 3 & 4 and there are no separate boundary walls. This is evident from the fact that the geographical coordinates for main plant area of Unit Nos. 3 & 4, in terms of the layout plan, lies inside the land of Unit 1 & 2.*

c) ***Switchyard :*** *Switchyard of Unit Nos. 3 & 4 has been made adjacent to existing switchyard of Unit Nos.1 & 2 on the land meant for Unit Nos. 1 & 2. During the site visit, the representatives of Respondent No.2 have been informed by the Petitioner that in lieu thereof a separate patch of green belt has been earmarked for Unit Nos. 1 & 2. However, sufficient information towards the same was not provided. Accordingly, it is submitted that as the Petitioner failed to furnish necessary details, adverse inference needs to be drawn against the Petitioner in as much as it has utilised land meant for Unit Nos. 1 & 2 for Unit Nos. 3 & 4. Further it is imprudent practice to have separate switchyard for different generating units located at the same place. The costs of switchyard ought to be proportioned and this Commission must approve the project cost only after prudence check. Without prejudice, it is further submitted that adverse inference ought to also be drawn against the Petitioner as the Petitioner is not giving satisfactory explanation to allegedly having it has not exercised proper prudence by having a separate switchyard for Unit Nos. 3 & 4.*

d) *Ash Pond: As per Environment Clearance dated 31.12.2007 granted by MoEF for Unit No.3, it has been, inter-alia, stated that:*

> *"Fly ash shall be collected in dry form and its utilization shall be ensured in accordance with the provisions of the notification of September, 1997 on fly ash Utilization and its amendment of August, 2003. The unutilized fly ash and bottom ash shall be disposed in the existing ash pond."*

e) *It is apparent from the above that the Petitioner is mandated to use the existing ash pond for unutilized fly ash and bottom ash. However, when the same was brought to the notice of the Petitioner by the representatives of the Respondent No.2, it was informed that separate Ash pond would be made for Unit No.3 & 4. The above position is completely contrary to the conditions stipulated by the MoEF and also establishes that the ash pond is required to be shared between the Unit No. 1 & 2 and Unit Nos. 3 & 4. Further, and in any event, location of a separate ash pond was not provided in the layout plant of Unit Nos. 1 to 4. Further, the Respondent No.2 was also informed by the Petitioners that they have acquired separate land for ash pond where high concentrated ash of Unit Nos. 3 & 4, will be disposed off. However no details were provided. It is also imprudent to have such separate ash dyke and ash disposal facilities.*

f) ***Boundary Wall****: No boundary wall separating Unit 1 & 2 with Unit 3 & 4 has been constructed. In the circumstances, as the land is contiguous, cost of land ought to be apportioned in terms of the capacity of each unit.*

g) ***Colony:*** *During the site visit, the Respondent No.2 was informed by the Petitioner that it has acquired separated land for colony of Unit Nos. 3 & 4, which shall be built towards the water intake side; however, no construction has started yet and cannot be verified at this stage.*

h) ***Water Intake system:*** *During the site visit, the Respondent No.2 was shown a separate construction site and was informed that a separate raw water pump house is being constructed on the said site. However, at present, after some initial construction, the entire construction work on the said site for the Water Intake System is at stand still. It is also not verifiable as to whether the Petitioner will use existing pipeline or provide a separate one for Unit No. 3 & 4. It is submitted that having a totally separate water Intake System, Raw Water Pump House and Water Pipelines for respective units is imprudent on the part of the Petitioner.*

i) ***Raw Water Reservoir****: No separate raw water reservoir could be seen. It has been informed that they are constructing an anicut in the river (Has deoriver) before raw water intake pump house with the permission of Chhattisgarh Government. Though, same cannot be verified at this stage as construction was at very initial stage. It is submitted that having separate Raw Water Reservoir for respective units is imprudent on the part of the Petitioner.*

j) ***Railway siding :*** *During the site visit, the Respondent No.2 was informed that a separate railway siding is being proposed for Unit Nos. 3 & 4. However, at present, there is no separate railway siding for Unit Nos. 3 & 4 and it would be rather imprudent on the part of the Petitioner to use separate sidings for Unit 3 & 4, instead of the existing one. Further and in any event, the proposed railway siding for Unit Nos. 3 & 4 is bound to be made on the land presently used for the existing railway siding of Unit 1 & 2. Accordingly, this Commission should apportion the costs between the units in terms of the generation capacity of each unit.*

k) ***Coal handling plant (CHP):*** *The CHP of Unit No.3 & 4, shown to the Respondent No.2, is already constructed adjacent to existing CHP of Unit Nos. 1 & 2. However, in the layout plan provided for Unit Nos. 1 to 4, it is to be constructed behind the ash pond of Unit Nos. 1 & 2. It would therefore mean that the Petitioner would use the Wagon Tipler Area identified in the layout plan for Unit No.1 & 2 for Unit Nos. 3 & 4. In the circumstance, it is evident that the cost for Coal handling Plant (CHP) would be shared between Units 1 & 2 and Units 3 & 4. In this regard, it is also submitted that the Petitioner has sought approval of an amount of Rs. 151.47 Cr. and Rs. 115.74 Cr. as cost for the Coal Handling Plant for unit 1 and Unit 2, respectively. Clearly, the cost of the Coal Handling Plant of the Petitioner is significantly higher, as compared to other power plants, details of which have been provided in the subsequent paragraphs.*

l) *It is further submitted that the in addition to the above assets, the following assets are also common and/or are likely to be shared between Units 1 & 2 and Units 3 & 4:*

i. Existing Roads within the power project of the Petitioner.

ii. Administrative Building

iii. Service building

iv. Fire Station

v. Field hostel

vi. Drainage System

10. *During the site visit a specific inquiry was made about the expansion of Units Nos. 5 & 6 of 660 MW each. There was no satisfactory answer given in regard to the location of such units 5 & 6. From the Layout plant, the said units it seems will be constructed within the map disclosed as in the case of Units 3 & 4 integrated with Units 1 & 2.*

11. *It be stated that the Lanco Amarkantak Power Project consist of several generating units, namely, Units 1 & 2 with 300 MW capacity each, units 3 & 4 with 660 MW capacity each and further units 5 and 6 being an expansion of the project again with a capacity of 660 MW each. Thus, the generating station as was originally considered was with 2x300 MW each and 2x660 MW each and subsequently there has been a proposal to expand the generating station by another 2x660 MW each. Unit No.2 of 300 MW, the subject matter of the present proceedings before the Commission, has therefore been a part of a large capacity generating station of 1960 MW, which has now increased to 3240 MW. All the above generating stations are contiguous in Korba in the State of Chhattisgarh. Accordingly, the generating units have been established with the intent to have sharing of various common assets and facilities and to achieve economies in the scale of operation.*

15.11 Thus the Haryana Utilities have been consistently urging since the beginning that there are common assets for Units 1 & 2 of the one part and Units 3 & 4 of the other part. The Haryana Utilities had given specific assets which are common in nature. In particular, reference may be made to the 8 assets which are given in the comparative statement filed before the State Commission. These assets have also been mentioned in the interrogatories given by the Haryana Utilities to Lanco in pursuance to the Order dated 25.3.20-14 passed by the State Commission.

15.12 It is incorrect to say that the submissions of the Haryana Utilities were vague or general in nature when the Haryana Utilities had specifically named the common assets. The Haryana Utilities could not have done more than naming the common assets. The information is with Lanco and it was for the independent Consultant E & Y to make a thorough investigation and decide on the same.

15.13 When the site visit was undertaken, the representative of Haryana Utilities pointed out with reference to the layout plan that the land of Units 1, 2, 3 & 4 (as well as at that time in coming to know about the Expansion Units 5 and 6) was common, no boundary walls were there, the geographical coordinates indicated the housing facilities of Units 3 & 4 on the land of Units 1 & 2, Lanco did not identify the specific land independent of Units 1 & 2 for housing of various facilities such as ash pond, railway siding, water intake system and water reservoir, switchyard, residential colonies etc.

15.14 If Lanco or E & Y were bona fide in their approach and had nothing to hide, Lanco could have easily pointed out at that time the identified places for housing facilities of Units 3 & 4 independent of Units 1 & 2. They failed to do so. The State Commission's representative [Director (Tariff)] was present. He was also a witness to the specific objections raised by the Haryana Utilities. The report of the Director (Tariff) on the aspect has not been placed on record of the case contrary to the specific provisions of the Conduct of Business Regulations. If the Director (Tariff) had dealt with the objections of the Haryana Utilities and including the plea that the land was not identified separately from Units 1 & 2 for housing the facilities of Units 3 & 4, the same will be material.

15.15 After the site visit, the Haryana Utilities filed a detailed submission before the State Commission explaining the events which took place in the site visit. The specific aspects raised by Haryana Utilities have not be considered at all by the State Commission.

15.16 The another vague answer to the above is that the approval for Units 3 & 4 was separately taken. This will not establish that the common assets are not used. As mentioned above the approvals for each generating unit being taken separately does not mean that there cannot be common facilities.

15.17 Above all, the total land for Units 3 & 4 shown in the E & Y report is 570.71 acres. The total land for Units 1 & 2 has been indicated as 766 acres. The major land as per the CEA report is for the ash disposal area, township, corridors for ash slurry, raw water, coal and water reservoir. It is not disputed that the super-critical main plant area will require lesser land as compared to sub-critical main plant area. However, there will be no difference in the issue of land for facilities like railway siding, ash pond, water reservoir etc. If the indicative land requirement under the CEA report is taken, the land for the three facilities which have been separately mentioned itself works out to 600 acres (approx.). It is,

therefore, impossible for Lanco to construct 2 x 660 MW Thermal Power Station in the remaining land.

15.18 However, if the Units 1, 2, 3 & 4 are commonly considered with the common facilities of ash point, reservoir, railway siding, residential colonies etc. then the 570 acres of land should be sufficient for housing the main plant and other facilities of Units 3 & 4.

15.19 In the above circumstances, it is submitted that the matter required deeper consideration by the State Commission. The State Commission ought not to have simply relied on the version of Lanco and E & Y. The State Commission ought to have exercised the prudent check in respect of the common facilities.

15.20 It is unjust and unfair to the consumers in the State of Haryana besides the Haryana Utilities that Lanco can be allowed to get away with such blatant claim un-substantiated and rather an attempt made to conceal the common facilities.

15.21 Above all, it is imprudent on the part in the generating company to create separate water reservoir, separate railway siding, separate residential colonies, separate ash pond for the generating units to be established.

15.22 The environmental clearance given by the Ministry of Environmental and Forest itself clearly establish that Units 1, 2, 3 & 4 were planned in a progressive manner with up-gradation of each facility as Expansion-1 and not as independent generating units. The economies of scale would require any prudent generator to plan the facilities required to the extent that can be common used to achieve the desired reduction in the cost.

15.23 The principle in regard to the sharing of cost of the common facilities is settled not only in the case of Hydro Electric Station but also the Thermal Power Station. It is to be with reference to the Mega Watt capacity.

15.24 In the circumstances mentioned above substantial cost of Common Assets has been unnecessarily loaded to Unit 2. As an afterthought, stories are being told that green area are transferred later for the land taken from Unit 2. Similarly, stories are being told that ash pond was originally considered to be common for Units 1 to 4 and the environmental clearance was taken based thereon but later it was decided to have a separate ash pond. No details are available as to the expression later; when change occurred. The recent environmental clearance also belies that there was no such change.

15.25 The form filed along with the recent letter dated 11.10.2017 clearly establish the representation by Lanco with regard to the common facilities. For example, in regard to railway infrastructure, it has been stated that no further facilities are required. Reference is also not merely to Unit 3 but also to Units 1 & 2 in regard to the facilities. The water system is also with reference to Hasdeo Canal which is also for Units 1 & 2.

15.26 In the course of the proceedings on 8.2.2018 and in response to the two documents filed by the Haryana Utilities on 6.2.2018 in regard to the common/shared assets including the land for Units 1 to 4, Lanco had filed a statement of the land required for Units 3 & 4. In comparison to the indicative land required for the power plant as specified in the report of the CEA reviewed the land requirement for the Thermal Power Stations. A bare reading of the comparative statement filed by Lanco shows that Lanco has been taking a wrong stand. In this regard the following are relevant aspects:

(a) The consistent stand of Lanco as well the E & Y, Consultant has been that the total land requirement of Units 3 & 4 is 570.71 acres

(b) There was no whisper at any point of time that the land requirement is 631 acres as mentioned in the statement dated 8.2.2018;

(c) Lanco admits that even according to Lanco 60.6 acres of additional land is required for housing various facilities;

(d) Further, as against the CEA's estimated 1013 acres of land, the extent of 631 acres works out to about 62% only. Such a variation cannot possibly be there on account of the aspects mentioned by CEA containing the report of possible variation. One could understand a variation of about 5 to 10% at the maximum from the CEA requirement of land. If the variation has to be in the range of around 380 acres, out of 1013 acres, the same is totally out of proportion and is not believable;

(e) The land requirement referred to in the statement dated 8.2.2018 is also contradictory to the land which Lanco itself had represented to the Environmental Ministry that 514 acres of land is being used for the power plant and associated facilities of 1 x 660 MW for Unit 4. This multiplied by 2 units works out to 1028 acres of land. This is not comparable to 631 acres of land which they stated to have acquired or under acquisition for Units 3 & 4. The same is comparable to what is indicated in the CEA report

(f) The land requirement for coal handling plant, ash disposal area, township and corridor for ash slurry raw water and coal mentioned in Item A (2), B (1), B)2) and (3) of the Statement given by Lanco at the hearing on 8.2.2018 is significantly lower as compared to the land requirement provided by the CEA. As against 160 acres of coal handling system project by the CEA it is only 106, as against 330 acres of ash disposal system, it is only 134 as against 67 acres of land for township, it is only 18 acres and as against corridor for ash slurry, raw water coal project of

163 acres it is only 36 acres. These clearly implies that greater part of land for Units 1& 2 are also being used for common assets/facilities;

(g) The township area of Units 1 & 2 have been existing with all facilities including the club house, guest house, facilities etc. For Units 3 & 4 the vague reply is given that people are staying outside. Whereas in the application to the Environmental approval for Unit 4 it is stated that all such facilities are provided.

(h) Further, while the counsel for Lanco dealt with the form attached to the letter dated 11.10.2017, as it is clearly stated therein that no new road, rail, air, water or other transport infrastructure are required.

16. Submissions of Lanco in Appeal No. 107 of 2015

Apportionment of Common Facilities

16.1 Along with its submission dated 13.01.2014, LAPL had supplied the details of apportionment of common facilities between Unit-I and Unit-II. This was supported by the certificate of Statutory Auditor. It would be seen from the said document, that the cost of facilities apportioned to Unit-II was less than cost apportioned to Unit-I.

16.2 E&Y carried out the exercise for sharing of common facilities between Unit-1 and Unit-2 only, to which no challenge has been raised by HPPC in the present Appeal and none was argued before this Tribunal. It is to be noted that the report of E&Y does not give any finding on the sharing of common facilities with Units III & IV. The report fairly states in Para 3.1 that *"Therefore the discussion in this chapter is restricted to Unit 1 and Unit 2 only"*. The report does not even purport give any finding that there are no common/shared assets with Units-I and II. In any event, without site visit, E&Y could not have given any finding on the alleged sharing of common facilities by Units 3&4. A specific direction was thus required from the Commission for conducting site visit, which was subsequently issued by the Commission.

16.3 HPPC's objection is that common facilities of Unit-1 and Unit-2 are shared with Units 3&4. In the hearing held on 28.07.2014,the Commission noted that actual physical site visit and verification had not been conducted and therefore directed site visit.

16.4 Accordingly, pursuant to the Order dated 28.07.2014 of the Commission a site visit was undertaken on 16/17.08.2017 jointly by representatives of E&Y, representatives of HPPC and officers of the Commission. This is recorded in the letter dated 20.08.2014 addressed by the Commission to the parties. The letter clearly records that *"All facilities of power plants (Unit-1 to Unit-4) including water intake system, ash dyke, coal handling, railway*

line/sidings etc. were visited." It further records that a copy of plant outlay and railway lines/sidings/drawings were provided by LAPL to the representatives of HPPC and E&Y. The letter also contains the photographs taken of the site. Even the photographs show that there are no common/shared facilities.

16.5 Pursuant to the site visit, E&Y gave a separate report thereon, which was provided to the parties by the Commission on the same day itself**.** The said report contains the factual position existing at the ground and confirms that Units 3&4 do not share any facilities with Units 1&2.

16.6 HPPC filed its objections to the report on 08.09.2014 to the report. The main objection raised by HPPC is that there are serious inconsistencies in the stand of LAPL that there are no common or shared assets with regard to Units 1&2 and Units 3&4. HPPC has alleged that LAPL has shifted its stand. In Para 9 of the affidavit, HPPC has given details of such alleged inconstancies. The said alleged inconsistencies are also reproduced in the statement appended to the Note of arguments filed by HPPC before the Commission. Interestingly, in the said affidavit, HPPC raised a fresh objection that Unit-5 and Unit-6(of 660 MW each) are also being planned to be established and therefore, the capacity of generating station becomes 3240 MW and cost of common facilities should be shared between all six units, with share of Unit-II coming to 10% approx.

16.7 The finding of the Commission in the impugned Order that there are no common facilities between Units 1&2 on the one hand and Units 3&4 on the other is based on the following:-

(i). Unit-1 was independently conceptualized planned and executed and common facilities were created for Unit-1 on standalone basis. Thereafter existing facilities of Unit-1 were augmented to cater to the requirements of Unit-2. This fact has never been disputed by HPPC at any stage.

(ii) The existing common facilities of Unit-1 & 2 have been designed for a capacity of 2X300 MW and the same cannot be used/shared with Units 3&4 and for that matter with Units 5&6 which are of much larger capacity i.e. 660 MW each. It has to be kept in the mind that the period of start and completion of all these units are different. There is a gap of 5-6 years between start of construction of Units 1 & 2 and Units 3 & 4. The approvals and permission etc. for all the units namely the Environmental Clearance, consent to establish, approval for drawing water, approval from railway authorities are admittedly separate for each of the units and granted at different times**.** None of these facts have ever been disputed by HPPC.

(iii). Pursuant to actual site visit, E&Y reports records a categorical factual finding that *"The capacities of existing facilities designed for 2X300 MW generation capacity does not allow them to be used for a much larger 2X 660 MW capacity of new plant*

i.e. Units 3&4. The layouts of the existing plant (Units 1&2) and that of the new plant (Units 3&4) also do not allow the existing BOP facilities for Units 1 &2 to be used for Units 3 & 4.

(iv). Pursuant to the site visit, E&Y report records a categorical factual finding that *"It is also found on site visit that the only physical connection between electrical/mechanical /coal/water systems of the existing plant and the new plant is the planned interconnection between the two 400kV switchyards, which are separated by a fence and have their own control rooms and evacuation arrangements. This connection gives a flexibility of operation and does not amount to sharing the assets of the existing plant (Units 1 & 2) with the new plant (Units 3 & 4)."* This covers all the facilities namely electrical, mechanical, coal, and water systems.

(v). E&Y further gives a categorical finding in the report that common facilities exist only between Units 1&2, as follows:-

> *"1. Balance of Plant (BOP) facilities of the existing 2x300MW plant is shared between Units 1 & 2.*
>
> *These are as follows:*
> *i. Coal Handling Plant*
> *ii. Fuel Handling System*
> *iii. Ash Handling Plant*
> *iv. Fire Detection & Fire Fighting System*
> *v. Raw Water Intake Station*
> *vi. Clarified Water System*
> *vii. DM Water Plant*
> *viii. 400kV Switchyard*
> *ix. Miscellaneous auxiliary units not specifically listed above.*

16.8 E&Y report clearly states that *"after the site visit, following points stood clearly established."* thereby indicating that the findings are clear and unequivocal. It is to be noted that the purpose of the site visit was to carry out actual physical verification of the facilities. Nothing has been placed on record by HPPC to dislodge or disbelieve the fact findings of E&Y and the team who visited the project site on 16/17.08.2014. There is no reason that the report of E&Y should be brushed aside and ignored as contended by HPPC, on the basis of vague, unspecific, unfounded and unsubstantiated allegations made by HPPC and the entire process conducted by the Consultant should be set at naught at this stage.

16.9 The commission comes to a conclusion that there are no common facilities of Unit 1&2 which are shared or will be shared with Unit-3 & Unit-4. This conclusion is arrived at by the Commission on the basis of:-

(i). detailed objections/submissions made by Respondent HPPC on apportionment of cost of common facilities, the counter submissions/clarifications submitted by LAPL in respect of each of the objections of HPPC.

(ii). The report of E&Y after the site visit of 16/17.08.2014 which a fact finding detailed and comprehensive report.

16.10 Thus, a detailed exercise has been conducted before arriving at the conclusion as regards sharing of common facilities, which conclusion is supported by cogent material on record and reasoning of the Commission. The conclusion is not either in the absence of relevant material on record or contrary to or inconsistent with material on record, and therefore does not warrant any interference by this Tribunal. To now say that the Commission has not done anything (as contended by HPPC) is totally unfair and uncalled for. The Commission has carried out a detailed exercise, which took more than a year, although this Tribunal had granted only two months.

16.11 During the course of hearing, HPPC reiterated the affidavit in objection filed by it before the Commission on 08.09.2014 as well as its Note of Arguments and sought to given an impression that the Commission has not specifically dealt with each and every objection raised by HPPC in the said submissions. HPPC did not raise any specific objection as regards sharing of common facilities. Although it named eight assets (which is more or less all assets that can be potentially shared) the focus was on two assets namely land and Ash Pond. Rest of the allegations as regards the other facilities were vague and unspecific. The E&Y in its report has categorically stated that "*The only physical connection between electrical/mechanical /coal/water systems of the existing plant and the new plant is the planned interconnection between the two 400kV switchyards, which are separated by a fence and have their own control rooms and evacuation arrangements. This connection gives a flexibility of operation and does not amount to sharing the assets of the existing plant (Units 1 & 2) with the new plant (Units 3 & 4).*" This clearly covers all the facilities namely electrical, physical, mechanical that can potentially be common in a thermal power plant. Therefore, the contention of HPPC that their objections remained unaddressed is devoid of any merit.

16.12 The contention of HPPC is that in the reply to Memorandum of Interrogatories, LAPL stated that no common facilities of Units 1&2 were being shared or will be shared by Units 3 &4. Subsequently on site visit it was found that part of land Units 1&2 has been used for

Units 3&4. Therefore, it has been alleged that LAPL made a false statement in the first instance.

16.13 In this regard, it is submitted that the statement of LAPL in the first instance that there are no common facilities shared by Units 3&4 including the land is absolutely consistent with the position at the site as well as the report of E&Y. The reply dated 18.09.2014 of LAPL as well as the report of E&Y show that it was informed by LAPL itself that some part of green belt earmarked for Unit-2 was used for Unit 3&4 and later on an equal amount of land which was taken for Unit-2 green belt area for Units 3&4 was transferred back to Unit-2 from the land acquired for Units 3&4. Hence total land allocated to Unit -2 remained 200 acres and no part of that was used by Unit-3. There is nothing wrong with this inasmuch as it was done to meet the requirements of another unit.

16.14 It is to be noted that land is owned by Lanco Amarkantak Power Ltd. as a company and not individually by the units. For the purpose of capital cost of each of the units, the value of land apportioned /used by each of the units is booked for that particular unit. Therefore, it historically, some part of the land was utilized by Units 3&4 and later on same amount of land was transferred or given back to Unit-2, there is nothing wrong with it. By transfer it does not mean that the land was conveyed (by a transfer deed etc.) from one unit to another unit. It means that the value of the land was booked to that particular unit who utilised the same. HPPC has failed to raise any specific objection to this finding and reasoning of E&Y. The finding of E&Y in the report is reproduced as follows:-

"4. Land: Unit 2 has been built partly on the green belt area for Unit 1. Additional land has been acquired to leave mandatory green belt for units 1&2 taken together. Since 200 acres has been attributed to Unit 2 and 566.89 acres to Unit 1, the cost of land considered for Unit 2 is less than half of the total for Units 1& 2 taken together.

It is our understanding that in a similar manner, part of the green belt earmarked for Unit 2 has been used for Units 3&4.Later an equal amount of the land which was taken from Unit 2 green belt area for Units 3&4 was transferred back to unit 2 from the land acquired for Units 3&4.

Hence, total land allocated to Unit 2 remained 200 acres and no part of that was used by Units 3&4."

16.15 As far as the objection of HPPC that land for Railway siding was also used by Units 3&4, it is clearly recorded in E&Y report that the said land was of Unit-1. It has clearly come on record that the land booked to Unit-2 was only 200 acres whereas the land booked to Unit-

1 was much more than land booked for Unit-1. This means that HPPC stands to benefit in so far as capital cost is concerned.

16.16 The objection as regards Ash Pond raised by HPPC is that Environmental Clearance for Unit-3 states that existing ash pond shall be used. Therefore, building a separate ash pond by LAPL is imprudent. The objection of HPPC has been squarely replied to. The need for building a separate ash pond was on account of the position that whereas Units 1&2 are disposing of bottom ash in traditional lean slurry form and fly ash in dry form, Units 3&4 are using more environmental friendly mechanism of High Concentration Disposal System (HCSD), which means that ash from Units 3&4 cannot be disposed of in the ash pond of Units 1&2. This has not been disputed by HPPC at any stage either before the Commission or before this Tribunal.

16.17 Similarly other objections including but not limited to there being no boundary wall etc. have also been dealt within the Commission, Order and E&Y report.

16.18 HPPC contends that during the site visit LAPL failed to identify the specific land independent of Units 1 & 2 for facilities such as Ash Pond, Railway siding, water intake system and water reservoir, switchyard, residential colony etc. Firstly, HPPC is only seeking to draw an inference on this basis that facilities of Units 1 & 2 would be shared by Units 3 & 4. Firstly, it is unfathomable as to how facilities meant for 300 MW unit could be used for two units of 600 MW each. Secondly, in Form-1 filled by LAPL along with its letter for extension of validity of Environmental Clearance for Unit-4, which has been relied upon by HPPC itself, shows that various facilities such as Ash Pond, Railway siding etc. are being separately built for Unit 4 (discussed in detail in the latter part). When the actual site visit report itself states that there are no common/shared facilities, the scope of drawing an indirect inference does not arise.

16.19 It is an admitted position and has never been disputed by HPPC that Unit 1 was conceptualised, planned and achieved financial closure on 20.09.2005 i.e. much prior to financial closure of Unit-2 on 15.09.2006, which has been separately appraised by the lenders. Unit-1 started generating power on 01.05.2009 when it was synchronized with the Gridand achieved COD on 09.04.2010 and Unit-2 was synchronized to the grid on 22.02.2010. The financial close of Unit-3 and Unit-4 was achieved in March, 2011 i.e. much after the completion of Units1&2. Thus, Units 1&2 were complete and were generating power much prior to even commencement of construction of Units 3&4.It is to

be further noted that Unit-1 was independently conceived and planned. Even the EPC contract for Unit-1 was executed exclusively for facilities required for Unit-1 on standalone basis. All these facts remained are noted in the impugned Order and were never disputed at any stage by HPPC. Thus, the contention of HPPC that the principles of economies of scales are to be applied where several generating units at the same site are planned is misconceived. The said principle would apply where all the units are planned simultaneously and are being set up as such. In the present case as is evident that Units-3 & 4 were planned 5-6 years after Units 1 & 2. In this regard the Commission has rightly observed that HPPC has taken contradictory stands i.e. on the one hand they would argue that there are common (shared) assets between various Units at LAPL site while on the other hand they would argue that it is prudent practice to have shared assets when several generating units are planned at the same site in Order to garner economies of scale.

16.20 Another contention raised by HPPC during the hearing was that report of Director (Tariff) pursuant to site inspection of 16/17.08.2014 has not been placed on record, which is contrary to Regulation 57 of the HERC (Conduct of Business Regulations). The said regulation provides for nomination of its officers, consultants etc. to visit any place for inspection and report on the existence of status of the place or any facilities therein.

16.21 Firstly, the Director (Tariff) had not prepared any report, therefore the question of placing the same on record does not arise. The Director (Tariff) has visited the site along with E & Y representatives who had been assigned the job of reporting to the commission. Admittedly, E&Y prepared the report and submitted the same to the Commission. Admittedly, objections were filed to the said report and considered by the Commission in the impugned Order. Therefore, the contention that Regulation 57 has been violated on the ground that the Director (Tariff) did not submit his report individually is devoid of any merit.

16.22 Another contention raised by HPPC was that the purpose of providing ceiling tariff in the PPA was that LAPL envisaged setting up of number of Units at the same place and economies of scale will reduce the capital cost and operating cost. This contention has not basis and is contrary to factual position if one sees the manner in which the units have been set up. The PPA itself does not provide for this reasoning as propounded by HPPC. The PPA does not even talk about anything more than a 300 MW unit. This contention of HPPC is thus based on surmises and conjectures.

16.23 It may be further noted that any reliance placed by HPPC on PPA is impermissible in view of the judgment dated 03.01.2014 of this Tribunal wherein it was categorically directed that tariff determination has to be de hors the PPA.

16.24 The reliance placed by HPPC on two judgments is also misplaced. The said judgments are dealt with herein below:

(a). Judgment of this Tribunal *THDC India Ltd. v. Central Electricity Regulatory Commission* (dated 29.05.2015 in Appeal No. 103 of 2014)

Paras 11.1 and 11.2 were relied upon by HPPC to advance a contention based on Regulation 4(2) of the CERC Tariff Regulations 2004. A perusal of the said regulation itself reveals that the principle of apportionment of common facilities contained therein would apply where stage wise, unit wise, line wise or sub-station wise breakup of the capital cost is not available and in case of ongoing projects. In the present case Units III and IV were appraised financially separately from the rest of the Units and that too in the year 2011. Therefore, unit wise capital cost of each of the units is separately available. There is separate financial closure and financial arrangement with the lenders for the all the four units. Secondly the expression "ongoing projects" clearly indicate that the units are being set up simultaneously, as was the situation in that case, as is revealed in Para 4.2 of the judgment which gives the dates of commissioning of the four units of the Project. Further, Para 4.6 of the said judgment reproduced the relevant extract of the order of the CERC holding that "As such the unit wise break-up of the capital cost with reasonable apportionment of common facilities, has not been made available by the petitioner."

(b). Judgment in *M/s Raj West Power Limited, Jaipur v. Rajasthan Electricity Regulatory Commission, Jaipur and Ors. 2012 ELR (APTEL) 0069.*

Para 11 of the said judgment was relied upon by HPPC. The relevant regulation providing for apportionment of common facilities was Regulation 14 of the RERC Tariff Regulations. Admittedly, no such regulation providing for apportionment of common facilities exist in HERC Tariff Regulations 2008. In the said case, as is evident from Para 11.1, it was an admitted position of the generator itself that many assets were to be used for all the units of the generating station. It was on that premise Regulation 44 was made applicable. Quite to the contrary, in the present case, Units 3&4 is not sharing any common facilities with Units 2 and 3, and therefore the question of apportionment of cost does not arise.

<u>IA No. 191/2018 filed by HPPC</u>

16.25 HPPC filed an application to place on record additional documents (IA No. 191/2018) which was allowed by this Tribunal vide Order dated 07.02.2018 while permitting to make

submissions regarding production of documents by the Appellant. Accordingly, LAPL had made submissions in the course of hearing as regards the said documents.

16.26 Two additional documents were filed by HPPC along with the said Application as follows:-

(i) Letter dated 11.10.2017 written by LAPL to Ministry of Environment, Forests & Climate Change for extension of validity of Environmental Clearance for Unit-3.

16.27 Reference was made by HPPC to certain information provided by LAPL in Form-1 appended to the said letter. The objections raised by HPPC on the basis of the said letter have been dealt with by the appropriate replies during hearing on 08.02.2018.

Report of CEA on Land Requirement

16.28 The second document placed on record by the said Application and relied upon by HPPC is the report of Central Electricity Authority ('**CEA**') on 'Review of Land Requirement For Thermal Power Stations' issued in September, 2010. Relying on the said report and more particularly the table given @ Page 44 detailing the land requirement for Pit head/Load Center stations based on indigenous coal. HPPC has compared the land requirement of 2X500 MW with land requirement of Units 3&4 (2X600 MW) to contend that for 2X500 MW the total land requirement is 1090 MW which is much more than the land requirement of comparable capacity Units 3&4 stated to be 570.71 acres. HPPC contends that land requirement for Units 3&4 is less than what it should, therefore, it should be inferred that Units 3&4 are using land and common facilities of Units 1&2. The contention is based on surmises and conjectures and has been raised inasmuch as HPPC has failed to establish directly that there is any sharing of assets between Units 1 & 2 on the one hand and Units 3 & 4 on the other.

16.29 It is submitted that such a comparison is not an exact mathematics, as is evident from the report itself. A perusal of the report shows that the land requirement has been assessed on four broad parameters namely unit size, number of units, type of coal (indigenous or imported) and location (pit-head or coastal). The report itself records that besides these, there are other site specific issues which determine the land requirements (Para 3.0 of the Report @ Page 31). The report then goes on to enumerate some of the site specific issues by terming it as inclusive. Para 3.2.2 of the Report (@ Page 41&42) shows that the area for corridors for raw water intake, ash slurry pipeline & MGR/coal conveyors would vary for plant to plant depending on the distance of ash pond from the plant, distance of railway track from the plant and distance of raw water intake point from the plant etc.

16.30 In case of Unit 3 of LAPL, the area being utilized for Facilities outside the power plant boundary i.e. Ash Disposal area, township, corridors for ash slurry, raw water and coal are much lesser than the requirement estimated in the report. This is clearly explained in the Chart given by LAPL in the hearing held on 09.02.2018, which contained in comparison between the normative land requirement as indicated in CEA report (@ Page 44) and actual land requirement for Unit-3 of LAPL.

16.31 It is for this reason the Report serves only as a Guideline and therefore in the last para in 'Foreword' @ Page 28 says *".....land requirement in this report will serve as a useful guideline to Government agencies, utilities and power plant developers for meeting the optimum utilization of land."*

System/Facility wise comparison with certain other power projects

16.32 The second objection raised by HPPC before the Commission as well as in the present Appeal is that it had done comparative analysis of cost of system/equipment of certain contemporary built power projects throughout the country and based on this analysis the cost equipment wise of Unit-2 was comparatively higher than the rest of the projects. HPPC contends that each one of the comparison has not been dealt with by the Commission. Such analysis was done by HPPC in its affidavit of objections dated 08.09.2014. This is also reproduced with the Note of Arguments filed by HPPC).

16.33 LAPL has replied to each of the comparison done by HPPC for every equipment of LAPL's Unit-II with other power projects. On the face of it, the following infirmities can be highlighted to the approach adopted by HPPC.

16.34 HPPC has chosen lowest cost of equipment/facilities in a particular power project to suit its convenience. For instance, for comparing the cost of Railway Siding, HPPC has considered Chabbra (Unit 1&2), Parli (Unit-6), whereas for comparing the cost of Water Intake System, Parli has been excluded and Sagardighi, Unit 1 & 2 have been introduced. This approach is consistent in comparison of all equipment including Switchyard, Ash Handling Plant, Coal Handling Plant, Land etc. This arbitrary pick and choose approach adopted by HPPC is totally misconceived.

16.35 HPPC has also stated that in almost all the cases the respective commissions, in the course of tariff determination, have apportioned the cost of common facilities between the units.

The Orders of the respective regulatory commission have been referred to in the comparative analysis chart. This has been stated while conveniently ignoring that in those cases, admittedly common facilities existed between the units. This is clear from Point No. 2 under Para A-Railway Siding @ Page 898 wherein the order of RERC is quoted:

"5.30………………., half of the cost of Railway siding amounting to Rs 25 cr., which is common to phase-1&2 is reduced from the capital cost". Likewise in case of other facilities, the same were admittedly common. Whereas in the present case, no common facilities exist between Units 1&2 on the one hand and Units 3& 4 on the other. Thus, the comparison done by HPPC is totally misconceived.

16.36 LAPL replied to each and every item cited by HPPC for comparison of the cost.

16.37 The Commission has noted the said comparison done by HPPC and the reply of LAPL. The Commission has rightly come to conclusion at Page 291 that "*arbitrary comparison of cost of a system/equipment with other Power Plant would not be appropriate as it depends on various factors which vary from plant to plant."* No fault can be found with the said reasoning of the Commission.

At Page 289 of the impugned Order, there is table which gives comparison of cost per MW of various power projects commissioned during the relevant period In fact LAPL. If the comparative analysis is to be done, it should be for the entire project and not a particular system/equipment. On this, it is found that the completed capital cost of Rs 4.52 crores/MW of Unit-2 is competitive and compared with other projects and lower to Parli, Chabbra, cited by HPPC itself.

17. Submissions of HPPC/HPGCL in Appeal No. 107 of 2015:

IDC and IEDC, Force Majeure events, Additional Capitalisation Allowed to LANCO

17.1 Lanco had wrongly claimed total capital cost inclusive of Interest during Construction (**IDC**) and Incidental Expenses during Construction (**IEDC**) as Rs.1667.39 crores, without any credible and authenticated data and information in support of its claims.

17.2 In the earlier proceedings leading to the Order dated 17.10.2012, the State Commission had taken the total basic capital cost as Rs.1340.04 crores. The difference in the capital cost claimed by Lanco and the capital cost earlier allowed by the State Commission worked out to Rs.1667.39 crores minus Rs.1340.04 crores = Rs 327.35 crores.

17.3 In the circumstances, it was incumbent on Lanco to give full and proper justification for claiming the above additional Rs.327.35 crores. Despite several opportunities being given, Lanco failed to provide the required justification for claiming the increased project cost. In the absence of satisfactory explanation and supporting documents for justifying the above additional Rs.327.35 crores, the State Commission should have rejected each of the additional claims, aggregating to Rs.327.35Cr.

17.4 The burden of establishing the necessity and reasonableness of the additional expenditure of Rs.327.35 crores was on Lanco. Since Lanco failed to discharge the burden, it was incumbent for the State Commission to reject the claims and instead proceed on the basis of the basic capital cost to be considered as Rs.1340.04 crores only subject to further adjustment on account of the apportionment of the capital cost of common assets intended to or capable of being used as shared assets, amongst unit 2 and other units and further adjustment to be carried for the sale of infirm power prior up to 07.5.2011.

17.5 Lanco is not entitled to claim any part of the IDC and IEDC or cost overrun on account of any time overrun for the alleged Force Majeure condition, namely, Earthquake in China as, affecting the implementation of the contract between the parties. The aspect of the implication of the above claim was considered by the State Commission in the Order dated 2.2.2011 passed in Case No. HERC/PRO-12 of 2010. The relevant extracts from the said Order, is as under:

"Having decided as above, the Commission examined the relevant provisions of the PSA/PPA to answer the issue of what relief can be claimed under the force majeure clause. The relevant clauses are mentioned below:-

….

A perusal of the above provision makes it clear that in an event of Force Majeure the parties are entitled for some relief in terms of extension in time for carrying out their respective contractual obligations. As far as the issue of compensating (in terms of tariff hike) for any consequential appreciation in Capital Cost is concerned, the Commission could not find any enabling provision in the PSA/PPA. Hence the second issue of whether any relief other than extension in time due to any Force Majeure event is admissible is answered in the negative i.e. no relief other than extension in time as explicitly provided in the PSA/PPA is admissible."

In terms of the above, the State Commission had considered the above event of Chinese Earthquake as Force Majeure only because of the provisions of Article 11.9(ii) contained in the Power Sale Agreement and more particularly in view of the fact that the Haryana

Utilities had not contested the said claim of Force Majeure given by LAPL/PTC, at the relevant time.

17.6 The State Commission in the earlier order dated 2.2.2011 has not considered the material aspect whether the Chinese Earthquake would amount to frustration of contract on grounds of impossibility of performance within the meaning of section 56 of the Contract Act, 1872. Thus, the acceptance of the plea of Force Majeure was only by implication of the provisions of the Power Sale Agreement and in the absence of the Haryana Utilities replying to the notice of Force Majeure.

17.7 At the same time, by construing the provisions of the Article 11.5 of the PPA and 11.6 of the PSA, the State Commission in the earlier order dated 2.2.2011 had categorically held that there can be no cost implication and as such there cannot be any cost overrun either on account of IDC or IEDC that can be considered. It was held that only time overrun, namely, suspension of the implementation of the contract can only be considered, on account of Force Majeure Event.

17.8 Article 11.6 of the PPA deals with the available relief if there is a force Majeure event. This Article read as under:

> *"11.6 Failure or delay caused by Force Majeure*
>
> *Neither Party shall be liable for any failure or delay in complying with its obligations pursuant to this Agreement to the extent that such failure or delay has been caused by or contributed to by one or more events of Force Majeure or their effects or by any combination thereof. The period allowed for the performance by the Affected Party of its obligations hereunder shall be extended by one (1) day for each day of continuation of an event or events of Force Majeure.*
>
> *Provided that such extension may be for such additional duration as may be required to compensate for any delay or failure resulting from the time spent on demobilization or restoration of the Project or the restoration of the Grid after cessation of an event or events of Force Majeure to the pre-delay condition, assuming diligent compliance by such Party."*

17.9 In terms of the above, the only relief admissible for Force Majeure even assuming but not admitting the same being there was extension -suspension of time. There cannot be any claim for compensatory payment or IDC or IEDC besides extension of time. In this regard the Hon'ble Supreme Court in Naihati Jute Mills Ltd. –v- KhyaliramJagannath[1968] 1 SCR 82 has held as under:

> *"10. Assuming, however, that there was a change of policy and that the Government in the intervening period had decided to place an embargo on import of Pakistan jute the question would still be whether the appellants were relieved that from liability for their failure to deliver the licence. A contract is not frustrated merely because the circumstances in which it was made are altered. The Courts have no general power to absolve a party from the performance of his part of the contract merely because its performance has becomes onerous on account of an unforeseen turn of events. M/s Alopi Parshad & Sons v. Union of India [1960] 2SCR 793. The question would depend upon whether the contract which the appellants entered into was they would make their best endeavours to get the licence or whether the contract was that they would obtain it or else be liable for breach of that stipulation. In a case falling under the former category, Lord Reading C.J. in Anglo-Russian Merchants-Traders v. John Batt & Co. [1917] 2 K.B. 679 observed that there was no reason why the law should imply an absolute obligation to do that which the law forbids. It was so said because the Court construed the contract to mean only that the sellers there were to make their best efforts to obtain the requisite permits. As a contract to such a case there are the cases of Pattahmull Rajeshwar v. K. C. Sethia [1951] 2 All. E.R. 352 and Peter Cassidy Seed Co. v. Osuustickaanppa [1957] W.L.R. 273 where the courts have observed that there is nothing improper or illegal for a party to take upon himself an absolute obligation to obtain a permit or a licence and in such a case if he took the risk he must be held bound to his stipulation. As Lord Sumner in Bank Lime Ltd. v. Capel (A) Co. Ltd. [1919] A.C. 435 said:*
>
> > *"Where the contract makes provision (that is, full and complete provision, so intended) for a given contingency it is not for the court to import into the contract some other different provisions for the same contingency called by different name."*
>
> *In such a case the doctrine of discharge by frustration cannot be available, nor that of an implied term that the existing state of affairs would continue at the date of performance. The reason is that where there is an express term the court cannot find on construction of the contract an implied term inconsistent with such express term."*

Thus, in terms of the above the available consequence provided in the PPA was the full and complete remedy.

17.10 Lanco was required to either accept the Order dated 2.2.2011 or the State Commission ought to have examined the issue whether the event pleaded by Lanco on merits would be of the nature of impossibility of performance under section 56 of the Indian Contract Act, 1872. The effect of Chinese Earthquake cannot be construed as leading to the frustration of contract or impossibility of performance within the scope of section 56 of the Indian Contract Act, 1872. In terms of section 56 of the Indian Contract Act, 1872, the only relevant aspect in the impossibility of performance is such impossibility of performance

can lead to release from the performance during the relevant time and there cannot be any increase in the cost.

17.11 The State Commission had concluded on the aspect of Earthquake in China as Force Majeure event only based on the earlier order dated 2.2.2011 and Lender's Engineer certificate and has not made any independent verifications.

17.12. The Haryana Utilities had made detailed submissions on the above aspect of frustration during the hearing and by way of written submissions. However, the State Commission has proceeded to allow IDC and IEDC or cost overrun holding the Chinese Earthquake as a Force Majeure Event in complete disregard to the Order dated 02.02.2011, the terms of the PSA/PPA and the settled principles of law on frustration of contract under Section 56 of the Indian Contract Act, 1872.

17.13 The Order dated 02.02.2011 passed by the State Commission was a subject matter of appeal before this Tribunal in Appeal No. 15 of 2011 and was decided vide Order dated 04.11.2011. Pertinently, the Tribunal did not interfere with the above findings of the State Commission on the aspect of Force Majeure. In fact, in the proceedings before the Tribunal leading to the passing of the Order dated 04.11.2011 in Appeal No. 15 of 2011, the senior counsel for Lanco had specifically stated that it was not challenging any of the aspect of the Order dated 2.2.2011 except the jurisdiction of the State Commission. In this regard the relevant extracts from the Order dated 04.11.2011 passed by the Appellate Tribunal in Appeal No. 15 of 2011 is as under**:**

"5. The Learned Senior Counsel for the Appellant in Appeal No. 15 of 2011 i.e. Lanco Power Limited has challenged the impugned order only on the ground that State Commission has no jurisdiction to deal with the dispute and to give any direction to the Appellant..."

17.14 The State Commission has wrongly proceeded on the basis that the finding of the State Commission contained in the Order dated 02.02.2011 cannot be considered by the State Commission as the Hon'ble Supreme Court vide its order dated 16.12.2011 had directed the State Commission to decide the dispute uninfluenced by any prior observations made by any authority in the matter.

17.15 The nature of directions issued by the Hon'ble Supreme Court and the apparent basis on which the directions were passed by the Hon'ble Supreme Court has not been considered. The Order dated 16.12.2011 passed by the Hon'ble Supreme Court was as an interim

measure, till the main issue i.e., whether the State Commission has jurisdiction to determine the tariff or the Central Commission, is adjudicated by the Hon'ble Court.

17.16 Furthermore, and without prejudice, even assuming without admitting, that the Order dated 02.02.2011 cannot be considered, then also the decision of the State Commission that the Chinese Earthquake was a Force Majeure Event is without any legal basis and is ex-facie unsustainable as the decision has been arrived at without carrying any legal analysis of the provisions of the PPA/PSA or the provisions of Section 56 of the Indian Contract Act, 1872. It is, further, submitted that in any event the alleged reasons, namely, earthquake in China is not a Force Majeure event making it impossible for Lanco to complete the construction of Unit No. 2 in Korba, Chhattisgarh.

17.17 The State Commission in approving the claim of IDC sought by Lanco of Rs.133.07 Cr from date of Synchronization till COD. has merely accepted the recommendation of the consultant, Ernst & Young, and inter-alia, held that since the benefit of net earnings from sale of infirm power is being passed on to the consumers by way of reduction of the completed capital cost to that extent, the IDC of Rs.133.07 cr., should be taken into account for determination of capital cost on COD. The error in the above finding of the State Commission is evident from the fact that the State Commission allowed the above claim of Rs.133.07cr in entirety after, observing that the delay of 14 months in declaration of COD after synchronization cannot be solely attributed to non-availability of LTOA as contended by Lanco as the reasons for the delay were attributable to Lanco. In fact, the State Commission had initially observed that 50% of the IDC of Rs.133.07 Cr incurred from synchronization of the Unit-2 to COD needed to be disallowed. In the circumstances, the finding of the State Commission with respect to the IDC claim of Rs.133.07 Cr of Lanco is ex-facie unsustainable and ought to be set-aside.

18. Submissions of Lanco in Appeal No. 107 of 2015

<u>Cost overrun (IDC, IEDC), force majeure events, capitalisation, etc.</u>

18.1 Unit 2 of LAPL was originally planned to be commissioned in September, 2009. On account of *force majeure* events i.e. earthquake in China on 12.05.2008 which damaged manufacturing facilities of DEC resulting into delay in supply of main plant equipment and BTG components and (ii) new visa policy enforced by GOI in September/October, 2009 which resulted into non availability of Chinese Engineers for erection and commissioning

for some time on account visa restrictions placed by Government of India, the construction of the Unit and completion thereof was delayed. The Unit was synchronized on 25.03.2010. Thus, there was time overrun and cost overrun in the form of Interest during Construction ('**IDC**') and Incidental Expenses during Construction ('**IEDC**') forming part of the final capital cost as on COD, certified by the Statutory Auditor.

18.2 The Commission has accepted earthquake in China as force majeure and reason for delay in synchronization of the Unit and rejected that the visa restriction resulted in delay.

18.3 HPPC contends that LAPL is not entitled to claim any IDC or IEDC or cost overrun for *force majeure* events as the same was rejected by the Commission in the Order dated 02.02.2011 on the ground that Article 11.6 of the PPA provides that the only relief that can be granted in case of force majeure is time overrun, and there can be no cost implication. Apart from this, only vague allegations of non-furnishing of credible and authenticated data have been made without any substance.

18.4 The said finding of the Commission contained in the Order dated 02.02.2011 as well as the contention of HPPC is premised on the position that there is no enabling provision for giving relief of cost overrun in the PPA. The said finding of the Commission cannot be considered at all as this Tribunal vide its judgement dated 03.01.2014 has directed re-determination of tariff dehors the PPA. Thus, the provisions of the PPA cannot be relied upon by HPPC. As per the said judgment of the Tribunal, the tariff is to be determined in accordance with the HERC Tariff Regulations, 2008, which provides that the capital cost on completion of the project shall be considered for tariff determination subject to prudence check.

18.5 On the aspect of *force majeure*, the Commission observes in the impugned Order as follows:- *"that the Hon'ble Supreme Court in its Order dated 16.12.2011 has held that 'the State Electricity Regulatory Commission, Haryana will decide the dispute uninfluenced by the observations made in the impugned Orders passed before today by the Appellate Tribunal and/ or any Authority in this case…' As such the Commission cannot rely on its Order dated 02.02.2011 to disallow overrun cost on account of increase in IDC as argued by the Respondents."*

18.6 Though LAPL has challenged the said order dated 02.02.2011 before the Hon'ble Supreme Court but it is a fact on record that the said findings in the order dated 02.02.2011 has not

been assailed either by LAPL or HPPC or for that matter by PTC. Further, the said portion of the order dated 02.02.2011 is fact finding rendered by the Commission which will not change in any scenario. It is misconceived on part of HPPC to contend that since PPA dated 19.10.2005 is not applicable therefore the fact that HPPC not disputing the condition of *force majeure* will not be applicable.

18.7 Reliance placed by HPPC on Section 56 of the Contract Act is totally misplaced and misconceived. The performance of LAPL was delayed on account of factors beyond reasonable control which was duly explained by LAPL in its reply to memorandum of interrogatories dated 09.04.2014 filed in the Commission. It is settled law that in case delay in execution of a generating project occurs due to factors beyond the control of the generating company e.g. delay caused due to force majeure then the generating company is entitled to benefit of the additional cost incurred due to time over-run. No impossibility was pleaded by LAPL, therefore the question of applicability of Section 56 of the Contract Act does not arise.

18.8 IDC is dependent on hard cost of the project which is decided along with the time duration of the Project and the applicable interest rate. The actual capital expenditure incurred upto the COD has to be considered as the completed capital cost in accordance with Regulation 12 of the HERC Tariff Regulations, 2008. Therefore, LAPL is entitled to the actual capital cost incurred by it. As stated above the increase in capital costs were on account of the reasons which were beyond the reasonable control of LAPL.

18.9 The Commission had also in its earlier Order dated 02.02.2011 had agreed that earthquake did happen and was a force majeure. The Commission, however, concludes and agrees with the Lender's Engineer's report that synchronization of Unit-2 was delayed due to earthquake in China and diversion of rotor of Unit-2 for Unit-1 and states that though the first reason was clearly beyond reasonable control of appellant, the second reason can only be attributed to LAPL.

18.10 The second part of conclusion that the synchronization of Unit – 2 was delayed due to diversion of rotor of Unit – 2 for Unit – 1 is erroneous inasmuch as the Commission failed to appreciate that there was no challenge or denial to the factual and specific statement made by LAPL on affidavit which was filed pursuant to directions of the Commission. The said factual statements are also recorded as under: -

"On 31.01.2009, rotor of Unit-1 of LAPL failed during its synchronization. Accordingly, rotor of Unit-1 was sent back to OEM, China in March, 2009. As due to the factors i.e. earthquake of China and visa issues, the overall construction and erection activities of Unit-II got delayed, the rotor of Unit-II was used in Unit-I only for the month of April, 2009 and Unit-I was synchronized on 01.05.2009. At that time, Unit-II Turbine Generator erection activities had just started after March 2009 after the effect of earth quake in China had ceased and as per the project construction status of Unit-II, generator rotor was not required to be used immediately and it was expected to be used only after August 2009. The Generator rotor of Unit-I for use in Unit-II was dispatched from China on 04.06.2009 well in advance of its requirement for erection at site."

18.11 The said factual and un-rebutted statements made by LAPL categorically show that the rotor was available for Unit-II much before it was required and use of rotor of Unit-II in Unit-I did not contribute any delay. The impugned order does not take this into account. The Lender's Engineer's Report in this regard. which was relied by the Commission ignoring the report of the Ernst & Young, independent Chartered Accountant appointed by Commission itself reads as under: -

"In view of the delay in the execution of the project due to Force Majeure event of earthquake in China, and delay in delivery Generator rotor of unit#1 (which was sent to China for repair and reuse in unit#2 to reduce the restoration period consequent to the damage of unit#1 steam turbine generator prior to oil synchronization on 30.01.09), the COD targeted in September, 2009 could not be achieved."

Nowhere the said Report, states specifically as to how much delay was caused because of diversion of rotor of Unit-II to Unit-1 and vice versa. The observation of Lender's Engineer's Report in this regard is too general and does not answer the specific dates mentioned in the submission of the appellant at stating that no delay has taken place because of diversion of rotors.

18.12 The finding of the Commission that it is not inclined to accept that the visa issue of Chinese workers has also been a reason of delay in synchronization of the Unit-II is contradictory inasmuch as the Commission of the Impugned Order inter alia holds non-availability of expert Chinese engineers on account of change in Visa policy as cited in the order dated 09.02.2012 of CERC is one of the factors which caused delay in commercial operation of the Unit-II.

18.13 The Commission failed to appreciate that the lender's engineer report dated 23.04.2010 is general in nature and does not indicate all the reasons for delay in achieving the commissioning of the Unit-II and therefore the rejecting the visa issue of Chinese workers

as a reason of delay in achieving commissioning of the Unit-II is wholly erroneous and incorrect especially when the Commission in its order dated 02.02.2011 has categorically held that the events of (i) earth quake in China and (ii) visa issue of Chinese workers did happen and the same was not disputed by HPGCL/HPPC. The Commission in order dated 02.02.2011 has held that the delay in commissioning of the Unit-II was on account of (i) earth quake in China and (ii) visa issue of visa issue of Chinese workers. The said finding of the Commission in the order dated 02.02.2011 admittedly was never challenged by the parties herein.

18.14 The observation of the Commission that LAPL has failed to submit lender's engineer report in respect of completed capital cost as on COD despite asking for the same is incorrect inasmuch as no such report was available with LAPL and as such there was no failure on part of LAPL. To substantiate the capital cost as on COD LAPL had already filed the duly certified auditor's certificate, which later on was independently verified by the Commission through E&Y

18.15 Thus, the Commission has clearly erred in not accepting the rotor issue as a reason beyond the control of LAPL and has erred in deducting 50% of the IDC uptill the date of synchronization of Unit-2.

18.16 In so far as the IDC of Rs 133.07 crores from date of synchronization to COD is concerned, the Commission although observed in the impugned order that *"going by the principles laid down in the ibid Order of the APTEL, 50% of the IDC of Rs. 133.07cr. incurred from synchronization of the Unit-2 to COD needs to be disallowed."* However, finally the Commission has rightly held that *"since the benefit of net earnings from sale of inform power is being passed on to the consumers by way of reduction of the completed capital cost to that extent, the IDC of Rs. 133.07 cr., in all fairness and in line with the recommendations of consultant E&Y, should be taken into account for determination of capital cost on COD."* This has resulted into enormous benefit to HPPC inasmuch as the earnings by sale of infirm power is much more than IDC incurred during the said period. If IDC for the said period is to be disallowed then earnings from infirm power i.e. an amount of Rs 311 crores approx., which is deducted from the capital cost will have to be added, thereby increasing the capital cost by an amount of Rs 180 crores approx.

19. Submissions of HPPC/HPGCL in Appeal No. 107 of 2015:

Increase in Cost of Civil and Construction Works, Steel etc.

19.1 The State Commission ought to have disallowed the entire claim of Lanco in regard to the increase in cost of civil and construction works in view of the fact that the contracts placed by Lanco on the sub-contractors were turnkey contracts on firm price basis and accordingly there could not have been additional claim on this account and more particularly, when the State Commission has observed that Lanco itself has written to the sub-contractor stating that no additional claims would be entertained.

19.2 The specific finding in the impugned order:

a. *"In view of these observations, it is felt that these additional claims have arisen on account of imprudence on the part of LAPL in selecting the contractors/sub-contractors.*
b. *In a firm price contract the risk of escalation in prices has to be entirely with the Contractor"*

In the circumstances the State Commission ought not to have allowed the fifty percent sharing of increase in price for more than 10% of the price increase. In such cases where the legal position is settled there cannot be any equitable consideration of allowing 50% in grounds of increase in steel prices etc.

19.3 The above finding of the State Commission is contrary to the judgment dated 18.01.2013 of this Tribunal in the Appeal No. 57 of 2012- Maharashtra Power Generating Company Limited –v- Maharashtra Electricity Regulatory Commission and Others wherein this Tribunal has held that in cases where delay can be attributable to the generating company, the entire cost due to time over run has to be borne by the generating company.

20. Submissions of Lanco in Appeal No. 107 of 2015
Increase in Cost of Civil and Construction Works, Steel etc.

20.1 Total increase in Cost of Civil and Construction Work is 69.53 Crores out of which 52.91 Crores is disallowed. The break-up of the same is as follows:

S. No.	Particular	Additional Claim in Crores
1	Increase in Span of Bay of Mill and Bunker building from 12 m to 17 m in Order to match with the requirement of traverse of the hoist and also to provide operational ease	23.93

2	Deck sheeting in TG building for construction of roof slabs to expedite construction activities	8.18
3	Requirement of pile foundation for stacker re-claimer hopper	9.27
4	Price escalation towards reinforcement steel, structural steel and cement.	33.24
Total		69.53

20.2 The Commission disallowed (1) 23.93 Crores , (2) 8.18 Crores and (3)9.27 Crores on the ground that:

- The Contract for Civil and Construction work on M/s ZPPL were turn-key and there is no question of additional claim.
- In the correspondence enclosed with Lender's Engineer report, there is a letter from LAPL to ZPPL/ ZCPIL wherein LAPL has written to ZPPL/ ZCPIL that under the Agreement the responsibility for complete design for 300 MW Unit rested with ZPPL/ZCPIL and as such no additional claims would be entertained.

  Further, from the correspondence submitted, it is apparent that extension in the span of Mill and Bunker building was done in Unit-1 also. Similarly, Deck sheeting in TG building to expedite construction activities was also done in Unit-1. LAPL should have taken care of such changes in Contract award stage.

- Further, Deck sheeting was used in T.G. building for saving time in construction and expenses incurred should be considered to have been paid back in the form of saving on account of reduced time of construction and accordingly no additional claim on this account should arise.

- Similarly, regarding additional claim for requirement of pile foundation for stacker reclaimer, it is observed that in a turn- key contract for construction the terms and conditions of the contract should necessarily provide that the foundation of the type required as per site conditions shall be provided and accordingly, no additional claim should arise for providing pile foundations for stacker reclaimer.

- In view of the above additional claim has arisen on account of imprudence on the part of LAPL in selecting the contractor/subcontractor, in finalizing the terms and conditions of the contractors and in handling the contracts.

  The above referred findings of the Commission and consequent deduction is erroneous in as much as Lender's Engineer has certified the technical requirement of executing additional work stating that certain requirement have undergone change during detailed engineering stage, based on equipment details furnished by vendors. The Lender's Engineer also certified that the claims towards additional work carried out by contractor are found to be in order. It may be noted that

Lender's Engineer is a technical body which carries out technical analysis before approving any cost. In the cost overrun, lenders are hugely circumspect in granting additional facilities, unless the project proponent establishes the need and requirement of same. Therefore, due weightage has to be given to Lender's Engineer report, it being an analysis for a neutral person i.e. the lender.

20.3. The detailed justification of the Lender Engineer in approving the above said cost is summarized below.

- **Increase in Span of Mill and Bunker**: Increase of 5 mtr in span of mill and bunker bay i.e from 12 to 17 mtr which was insisted by BTG supplier in order to match the requirement of traverse, of the hoist and operational ease. The details of actual expenses as certified by Lender's Engineer is furnished.

- **TG Building**: As per Contract TG building originally envisaged by M/s ZPPL is of RCC structure and the contractor found it difficult for completion of building within the schedule. The details of actual expenses as certified by Lender's Engineer is furnished.

- **Stacker Reclaimer Hopper**: The area meant for Stacker-Reclaimer hopper was a filled up soil because of its nature ZCIPL(Contractor) had to go for pile foundation and has lead to additional expenditure towards manpower and material. The details of actual expenses as certified by Lender's Engineer is furnished**.**

20.4 Additionally, the Commission disallowed (4) 16.62 Crores – 50% and allowed 16.62 Crores – 50% on the ground that since there is a firm price contract, the risk of escalation has to be borne by Contractor and considering increase in prices too steep, half of the claim can be considered.

20.5. The above deduction is again contrary to the HERC Tariff Regulations, 2008 in as much as it has neither been held by the Commission that the above cost was not incurred by LAPL nor has the Commission held that the said cost was incurred imprudently by LAPL.

20.6 Further, the Commission, even after acknowledging the fact that the increase in price was too steep, did not allow the entire cost already cost incurred by LAPL, which is ex-facie unjustified. Lender's Engineer's in its report has stated that during May 2006-Dec 2008, ZCIPL (contractor) has seen abnormal increase in cost of reinforcement steel, structural steel and cement. The details of actual expenses as certified by Lender Engineer is furnished.

20.7 The Commission did not appreciate that the contractor was a Malaysian Contractor selected after due diligence as a specialised contractor for execution of the Project. The additional

works changing the original scope of work was felt necessary to be executed during detailed engineering of the works. There was no imprudence and moreover, when scope of work changes, the fixed cost or lump sum cost formula does not apply.

20.8 The finding of the Commission that *"Commission considers that at best the increase beyond 10% can be shared by LAPL and Contractor fifty- fifty"* has no rational basis inasmuch as when the increase in price is too steep, which factor is beyond reasonable control of the Contractor then there is no reason why the Contractor should bear the increase below 10% and 50% of the increase beyond 10%.

21. Submissions of HPPC/HPGCL in Appeal No. 107 of 2015:

Infirm Power Adjustment

21.1 Lanco did not give full details with supporting documents on the quantum of sale of infirm power for the period till 6.5.2011 from Unit No. 2. The audited accounts of Lanco indicates that there was a total sale of Rs1889.10 crores of power during the period 2009-10 to 2010-11 from both Units 1 & 2 i.e., prior to 7.5.2011. There has been further sale of infirm power from Unit No. 2 during the period 1.4.2011 to 6.5.2011. Further Unit No. 1 is represented to have been commissioned on 09.04.2010. The amount of Rs.1889.10 crores plus the sale of power from Units 1 & 2 for the period till 6.5.2011 was to be considered as the basic amount of sale of infirm power for which Lanco was required to give satisfactory evidence.

21.2 It was the Haryana Utilities submission that if Lanco failed to properly justify the above aspects, namely, sale of power from Unit No. 1, then the entire amount of Rs.1889.10 crores minus the quantum of infirm power considered for Unit No. 1 at Rs.467.50 crores should be taken as infirm power sold from Unit No. 2.

21.3 As per the Haryana Utilities, an amount of Rs.1340.04 crores needed to be adjusted by the above value of infirm power. However, the State Commission vide the impugned judgment and Order dated 23.01.2015 has proceeded to mechanically accept the submissions of Lanco on the quantum of sale of infirm power at Rs.311.28 crores towards Unit No. 2, even though Lanco failed to provide any satisfactory evidence in support of its claim.

21.4 Lanco as a generating company has the obligation to satisfy and discharge the burden namely that the adjustments to be made regarding infirm power, by placing on record all

the relevant particulars. However, despite the fact that Lanco has failed and/or withheld disclosure of necessary particulars, the State Commission has not drawn an adverse inference against it and has instead accepted the skewed figures, at face value.

22. Submissions of Lanco in Appeal No. 107 of 2015:

Infirm Power Adjustment

22.1 The findings of the Commission on this issue are contained at, a perusal whereof would show that the same is logical, sound and sustainable. LAPL had claimed actual capital expenditure incurred upto the COD which was supported by a certificate from its Statutory Auditor as per applicable HERC Tariff Regulations, 2008. The cost overrun in the project cost was approved by Lender's Engineer after a thorough independent assessment and verification.

Lanco has stated that the net revenue generated from sale of infirm power after fuel expenses of Unit-II is (Rs. 311.28 Crores) from date of synchronization (22.02.2010) upto the declaration of COD (07.05.2011),which is reflected in the certificate issued by Auditor certifying the capital cost of Unit II. The benefit of reduced capital cost has been clearly passed on to the consumers of State of Haryana as the revenue generated from sale of infirm power from Unit-II has been deduced from the capital cost of Unit-II in accordance with HERC Tariff Regulations, 2008.

22.2 The contention of HPPC that as per financial statements of LAPL filed for the year ended 31.03.2009, for the period 2009-10 and for the period 2010-11, the sale of power from Unit I and Unit-II before the declaration of the date of commercial operation aggregate to Rs. 1889.10 crores is irrelevant for the computation of infirm power revenue generated from Unit-II.

22.3 As per Lanco, HPPC is trying to mislead by quoting the consolidated financials of LAPL, which includes gross revenue from sale of power from Unit-I before and after COD of Unit I in addition to the sale of infirm power from Unit-II before its COD 07.5.2011. Unit I was synchronized on 01.05.2009 and its COD was declared on 09.04.2010 whereas Unit II was synchronized on 22.02.2010 and its COD was declared on 07.05.2011. The net revenue generated from sale of infirm power after fuel expenses of Unit-II is (Rs. 311.28 Crores) from date of synchronization (22.02.2010) upto the declaration of COD (07.05.2011) which is reflected in the certificate issued by Statutory Auditor certifying the capital cost of Unit-

II. Complete details in relation to Energy Export and Amount of infirm power solely pertaining to Unit-II had been already submitted by LAPL before the Commission in CASE NO: HERC / PRO – 1 OF 2012 vide its tariff petition dated 12.01.2012 and the same were also placed on record as Annexure-4 of the tariff petition dated 12.01.2012. On 25.03.2010 i.e. the day when the Unit-II touched full load the assets of Unit-II of LAPL were capitalized in the book of accounts. The financial statements as at March 31, 2011 along with auditor's report and financial statements as at March 31, 2010 along with auditor's report of LAPL were submitted by LAPL before the HERC vide its reply dated 19.07.2012 to the objections filed by HPPC in CASE NO: HERC / PRO – 1 OF 2012 and the same were also placed on record as Annexure-B of the reply dated 19.07.2012. The financial statements-as at March 31, 2012 along with Auditor's report were placed on record of HERC with the rejoinder dated 01.03.2014. The standalone financials of Unit-II certified by the Auditor for the period as on 25.03.2010, as on 31.03.2010, as on 31.03.2011 and as on 07.05.2011 were placed on record of HERC.

22.4 Furthermore, E&Y has also verified the details of infirm power pursuant to the directions of the Commission and found to be correct and in order.

22.5 The Commission's observation that the net capital cost of Rs 1235.28 crores of Unit-2 determined by the Commission is comparable with the net capital cost for Unit-1 of LAPL of Rs 1236.40 crores determined by the Madhya Pradesh Electricity Regulatory Commission in its order dated 27.04.2011 is incorrect.

22.6 In fact, the net capital cost of Unit-2 is less than the capital cost of Unit-1. This is because the infirm power adjustment in Unit 1 was Rs. 467.5 Cr. (much higher) in comparison to infirm power adjustment in Unit 2 which was Rs. 311.28 Cr. It clearly shows that the infirm power adjustment in Unit 1 was Rs. 156.22 Cr. more as compared to infirm power adjustment in Unit 2. Thus, actually, the capital cost of Unit-1 has to be more than Unit-2 by an amount of Rs 156.22 crores. This is considering that both the units are of same size, located at same place and built in the same period.

23. Submissions of HPPC/HPGCL in Appeal No. 107 of 2015:

Computation of Energy Charges:

23.1 HPPC have contended that the State Commission should have restricted the fuel cost on the basis of the maximum of what would have been the cost of linked mine of Southern

Eastern Coalfields (SECL) i.e., subsidiary of Coal India. The cancellation of supply from the linked mines on account of the termination of the PPA by Lanco and therefore being attributable to Lanco should be to the account of Lanco.

23.2 The exorbitantly high cost of coal obtained from alternate sources, including e-auction, direct purchases, imported coal etc. without any prior approval of the Haryana Utilities, should be entirely at the risk and cost of Lanco and should not be passed to the Haryana Utilities.

23.3 Haryana Utilities have further argued that the weighted average GCV of coal for supply of power to the Haryana Utilities by considering the price of costly coal purchased from alternate sources, including, e-auction, open market, imported coal etc., when it should have restricted the fuel cost on the basis of the maximum of what would have been the cost of linked mine of Southern Eastern Coalfields (SECL) i.e., subsidiary of Coal India. The entire project of Lanco Unit-2 for sale to Haryana Utilities was conceived on the basis of linkage coal from SECL and hence it was the responsibility of Lanco to arrange the required coal from SECL. There cannot be any obligation placed on the Haryana Utilities to pay for energy charges in excess of price that would be applicable for the supply of coal by SECL.

23.4 The coal procured by Lanco from alternate sources including e-auction, direct purchases, imported coal etc., should be entirely at the risk and cost of Lanco. The price of linked mines coal has been in the range of about 1000 per M.T., whereas the price of eauction and other alternate source of coal has been in the region of Rs 3000 per MT {3 times costlier}

23.5 The main reason for Lanco not getting the full quantum of coal from SECL was the fact that it had wrongly terminated the arrangement to supply electricity to the distribution licensees, namely, the Haryana Utilities, representing Uttar Haryana and Dakshin Haryana in respect of Unit No. 2. In view of the above, Lanco should have been made responsible for the price paid for the coal in excess of the price that would have been payable to SECL by Lanco if it had continued to get the coal from SECL in terms of the original allocation made in the year 2006.

23.6 The State Commission has wrongly adopted the methodology for determining the landed cost of coal considering coal procured from alternate sources despite observing the fact that Lanco had not sought the specific approval of the Haryana Utilities for procurement of coal

from such costlier sources like open market or imported coal. The State Commission has further erred inasmuch as it has erroneously directed that future supply of power by Lanco from Unit – 2 to the Haryana Utilities shall be made only upon a mutually agreed procedure being evolved and followed for procurement of Coal other than linkage coal, till further orders are passed in the matter by the Hon'ble Supreme Court.

23.7 The contention of Lanco that the energy charges qua Haryana should have been computed on the basis that the coal available from SECL has been used for generation of electricity of 65% of the capacity allocated to Haryana and 35% capacity allocated to Chhattisgarh in terms of the Order passed by the Tribunal and Order passed by the Hon'ble Supreme Court is wrong.

23.8 The coal linkage for the power plant was given by SECL to Lanco on the basis of the PPA entered into between Lanco and PTC India and the PSA entered into between PTC India and the Haryana Utilities i.e. based on the electricity being sold to Haryana. In this regard in the letter dated 28/29.9.2012 SECL has written to Lanco as under:

> "*Supplies were resumed for 300 MW, Unit-II of M/s. LAPL, under the extended period of MOU dated 30.08.2011, for the month from July 2012 and onwards till further advice, as per letter no. SECL/BSP/S&MCOMM/16/LAPL/1502 dated 10.07.2012.*
>
> *In accordance with the recent directives of MOC/CIL regarding requirement of long-term PPAs, the status have been re-examined. 177 MW (65% of 273 MW or 59% of 300 MW) capacity of Unit-II is presently covered under PPA with DISCOMs of Haryana through PTC.*
>
> *Thus, bookings in respect of Unit-II (300 MW) are to be restricted to the extent of 46,216 tonnes/month (59% of quantity allocated by CIL under MOW @ 78.333 tonnes/month), for the period from 01.07.2012 and onwards (presently supplies under MOU are permissible only up to December 2012). Any quantity booked in excess will be adjusted.*
>
> *SECL reserves the right to make any further adjustment in quantity / price as per applicable guidelines of MOC/CIL, if required."*

23.9 The above is also clear from the fact that SECL had subsequently terminated the FSA entered into with Lanco on the ground that Lanco had terminated the PPA with PTC India for generation and sale of electricity ultimately to be delivered to the Haryana Utilities.

23.10 There was, therefore, a clear nexus between the coal allocation to Lanco and generation and supply of electricity from Lanco for the use by the Haryana Utilities.

24. Submissions of Lanco in Appeal No. 107 of 2015:

Computation of Energy Charges

24.1 The findings of the Commission on this issue are at a perusal whereof would show that the same is logical, sound and sustainable.

24.2 The contention of HPPC that LAPL is not entitled to energy charges based on any coal used by it other than through procurement of coal under a regular Fuel Supply Agreement with coal India/its subsidiary is contrary to the judgment dated 03.01.2014 of this Tribunal. HPPC contends this on the basis PPA envisaged supply of power on 100% linkage coal. In terms of the said judgment the energy charges are to be calculated as per the HERC Tariff Regulations, 2008 and not as per the PPA. Further, as per the directions of this Tribunal LAPL had submitted the requisite materials showing that it made bonafide efforts to secure coal linkage from SECL as envisaged at the project planning stage, along with the letter dated 13.01.2014.

24.3 Lanco has claimed that that since 07.05.2011 when LAPL commenced power supply to PTC for onward supply to HPPC, there has been frequent downward revisions in the supply of linkage coal by SECL. In spite of financial hardships LAPL had tried its best to operate its Unit-II and supply power to PTC for onward supply to HPPC by procuring the balance requirement of coal from alternate sources (where the cost of coal was at least 3 to 4 times higher than the cost of linkage coal) without realization of a just and equitable tariff which was not even meeting its generation cost. It is an admitted position that LAPL was facing severe hardship on account of the increasing burden due to coal costs (in view of the reduced quantities of coal being supplied by the government undertakings in light of the New Coal Distribution Policy). It is submitted that the coal linkage from the SECL to LAPL had decreased from what was originally envisaged with the SECL i.e. 100% linkage coal.

24.4 LAPL has been running its Unit II and supplying power to PTC for onward supply to HPPC by procuring the linkage coal supplied by SECL under MoU route and meeting its balance requirements of coal from alternate sources. The linkage coal supplied by SECL was widely varying and it was sufficient for only 27% PLF and hence the additional coal was procured from alternate sources which are much costlier than the linkage coal which had caused additional working capital expenditure and further the payment was not fully

realized at par with the cost of generation from PTC. The tariff was to be determined based on the directions of the Hon'ble Supreme Court by its order dated 16.12.2011 and direction of this Tribunal for the power which had already been supplied based on costs actually incurred. LAPL only sought reimbursement of the actual costs incurred by it in accordance with directions of Tribunal. To comply with the order dated 16.12.2011 of the Supreme Court, LAPL was receiving widely varying quantum of linkage coal under MoU route from SECL, the coal procured from alternate sources also widely varied to run the Unit-II and supply power to PTC for onward supply to HPPC. LAPL had to spend additional working capital to procure the coal from alternate sources varying on month to month basis based on the quantum of linkage coal supplied.

24.5 The Commission, in the impugned Order has considered the consumption of costlier coal for UI energy (some power was sold as UI) in the first instance and consumption of balance coal (including linkage coal) for supply of power to CSPTCL (Chhattisgarh) & HPPC (Haryana) based on the scheduled energy for the period commencing from 07.05.2011 to 30.06.2012. However, w.e.f. 01.07.2012, the costlier coal was considered for UI energy & Chhattisgarh and balance coal was considered for Haryana. While considering the utilization of balance coal (linkage / e-auction/ Open market/ Imported) for Haryana's share of power supply, linkage coal was considered to be first utilized to the full extent and then balance normative consumption was adjusted against e-auction, open market and imported coal in the same order of preference.

24.6 The above methodology adopted by the Commission is wholly erroneous, illogical and irrational. The categorization of coal based on the source of supply i.e. linkage, e-auction, imported and considering the cheapest coal for supply of Haryana is contrary to the remand order dated 03.01.2014 passed by this Tribunal. It was not permissible for the Commission to adopt such discriminatory and biased approach. The methodology adopted by the Commission has resulted in under recovery of Rs. 50 Crores of energy charges to LAPL.

24.7 For future supply of power from Unit-II is concerned, the Commission has directed that a mutually agreed procedure shall be evolved and followed for procurement of Coal other than linkage Coal till further Order is passed in the matter by the Hon'ble Supreme Court. This direction of the Commission is in contravention of the remand Order dated 03.01.2014 passed by this Tribunal wherein it has categorically held that LAPL would be entitled to cost of coal as per HERC Tariff Regulations 2008. Therefore mechanism proposed by the

Commission in the impugned Order for LAPL and HPPC to agree on the source of coal is contrary to the Regulations as well as the Order dated 03.01.2014 passed by this Tribunal.

24.8 It is further pertinent to mention that the term fuel is not a defined term in the HERC Tariff Regulations, 2008. Without prejudice to the above, it is submitted that the formula for computation of energy charges in the regulations specifies only primary fuel (coal, gas or naphtha i.e. coal irrespective of the category of coal such as linkage coal, e-auction coal, open market coal or imported coal). Therefore, the direction is contrary to Regulations as well.

24.9 As far as the bonafide efforts made by LAPL to secure coal linkage quantity as envisaged at the project planning stage are concerned, LAPL had furnished all relevant correspondence with SECL as well as to CIL, CEA, MOP, MOC from time to time to HERC establishing that it has made bonafide efforts to obtain the linkage coal quantity as per the LOA quantity. It is already an admitted position and part of record that SECL had been supplying linkage coal with progressively reduction in linkage coal quantities from time to time.

24.10 In respect of the energy charges claimed by LAPL considering the actual coal cost incurred in its books of accounts, the methodology followed by the Commission is not in line with the applicable HERC Tariff Regulations, 2008 as LAPL was being supplied linkage coal from SECL to the extent of yearly average 27% PLF only with month-wise huge variations in supply due to reasons beyond the control of LAPL. In some months, there was no linkage coal supply by SECL. The linkage coal supplied by SECL was not even sufficient to run the plant even at technical minimum PLF of 50%, there was always shortfall in linkage coal which was met by procuring coal from alternate sources viz. e-auction/open market/imported coal. On a month to month basis, the coal stock at the beginning of the month was not sufficient to even generate power at technical minimum PLF of 50% and supply power to the respective beneficiaries. LAPL had submitted all the supporting coal invoices to the Commission which were also independently verified by E&Y and the Commission.

24.11 There were certain additional important factors such as grid restrictions (due to non-commencement of long term open access power was scheduled on short term open access basis) which had resulted in partial clearances or even total rejection of short term open access applications filed by PTC to NRLDC/WRLDC, especially for the period July 2012

to March 2013, post grid collapse and creation of a separate region named W3 for generators located in Chhattisgarh region. This had resulted in injection of power to grid in the form of UI, which was beyond the control of LAPL. The Commission has not correctly appreciated the said aspect while passing the Impugned Order.

24.12 During the period July 2012 to March 2013, LAPL was forced to run the Unit-II at minimum technical loads due to grid restrictions, sometimes with steam bypass valve open mode with average PLF of 52.7% and WRLDC pressurizing through its oral and written codes to LAPL to stop the Unit in the absence of insufficient schedule from PTC (Haryana). The running of Unit-II at such partial loads had even led to much higher heat rates than the normative heat rates which had resulted in under recovery of energy charges. The Commission has not correctly appreciated the said aspect while passing the Impugned Order.

24.13 The Commission has not appreciated that even if the linkage coal quantity supplied by SECL is in accordance with the modified New Coal Distribution Policy dated 26.07.2013, issued by Ministry of Coal for coal based thermal power plants across the country, it will suffice generation corresponding to only 55% Plant Load Factor. The applicable HERC Tariff Regulations, 2008, on the basis of which the Commission has re-determined the tariff vide the impugned order, commencing from the commercial operation date of Unit-II, provide for annual target availability of 80% to recover the fixed charges of the Unit. Therefore, even to attain the annual target availability of 80%, LAPL still requires to purchase at least 25% additional domestic coal from alternate sources such as e-auction or open market. Further, technically the domestic coal based unit has been designed to operate efficiently at optimum plant load factor above 85%.

24.14 In any regulated tariff structure, wherein the tariff is determined in accordance with the applicable regulations, the energy expenses are determined considering coal cost as pass through in tariff and therefore based on the actual weighted average landed cost of coal from all sources accordingly. Further, the Commission has been approving the above mentioned principle of actual weighted average landed cost of coal for the computation of variable energy charges in respect of the thermal generating stations owned and operated by the HPGCL. This position has been deviated from by the Commission in the present case.

24.15 Computation of energy charges by considering the supply of coal from other sources namely imported open market, e-auction etc., to be first allocated for UI and remaining coal to be considered for Discoms, as proposed and discussed in the meeting dated 18.11.2014 between E&Y officials and the Commission is not justified and has not rationale and will lead to heavy under recovery of energy charges to the extent of more than Rs. 53 Crores, in spite of the fact that this coal cost has already been incurred by LAPL while running the Unit at partial loads in the absence of adequate quantity of coal required for running the Unit even at technical minimum load of 50% PLF. This is a significant amount for maintaining tariff viability of Unit 2 of LAPL's Project. Further, such a computation methodology is contrary to Regulation 17 (2) of HERC Tariff Regulations, 2008

24.16 The Commission ought to have allowed the energy charges based on the month wise weighted average landed cost of coal computed after considering the opening stock of coal at the beginning of the month, coal received during the month, coal consumed during the month and the closing stock of coal at the end of the month as per details provided in the month wise Form 19 submitted to the Commission. In addition, LAPL has already submitted the month wise weighted average GCV of actual coal fired during the month. Apart from these two above parameters, for the computation of month wise energy charges, the other parameters such as Gross Station Heat Rate, Auxiliary Energy Consumption are normative parameters as per the tariff regulations.

24.17 In a nut shell HPPC's contention is that it is not liable to pay for energy charges in excess of price that would be applicable for the supply of coal by SECL. The coal procured by LAPL from alternate sources including e-auction, direct purchases, imported coal etc., should have therefore been entirely at the risk and cost of LAPL.

24.18 The entire premise of the HPPC' argument i.e. the source of coal for the purpose of tariff determination was mandatorily and necessarily had to be linkage coal from SECL is flawed and contrary to the remand order dated 03.01.2014 passed by this Tribunal and is stated to be rejected.

25. Submissions of Lanco in Appeal No. 117 of 2015:

Relaxation in Regulations for O&M Expenses

25.1 LAPL had filed an application dated 04.02.2014 under Regulation 33 of the HERC Tariff Regulations, 2008 seeking relaxation of Regulation 16(iv)(c) of the said Regulations

concerning O&M expenses and to grant O&M expenses of Unit-II as per CERC Tariff Regulations, 2009. Without prejudice to the above and in alternative LAPL prayed for grant of O&M expenses at least as per actual expenditure incurred by it. Cogent reasons were given to relax the regulations, as is evident from the averments made in the application and documents filed along with.

25.2 The Commission rejected the prayer made in the said application and disposed of the application for the reason that this Tribunal had directed the interim tariff to be determined by applying HERC Regulations 2008. Specific reference is made by the Commission to the Order dated 03.01.2014 of this Tribunal to hold that O&M expenses should be determined as per the Tariff Regulations of the State Commission. LAPL has challenged the said finding on the following grounds.

25.3 In this regard it is submitted that this Tribunal, while discussing, various parameters/components of tariff, had observed that O&M should be as per State Commission's regulations. There was no specific reason for stating that O&M should be as per State Commission's regulations. Ultimately, this Tribunal directed that the entire tariff determination shall be as per State Commission's regulations. The Commission, however, failed to appreciate that the HERC Tariff Regulations, 2008 itself contain a provision for relaxing the said regulations i.e. Regulation 33 and this was a fit case to invoke the said provision. The power to relax is conferred by the statutory regulations and this power has not been taken and cannot be taken away by the judgment dated 03.01.2014 of this Tribunal. By making observation as regards O&M Charges, the judgment dated 03.01.2014 never meant that power of relaxation shall not be exercised by the Commission under any circumstances.

Regulation 33 reads as under:-

> ***"Regulation 33: – The Commission, for reasons to be recorded in writing, may vary any of the provisions of these regulations on its own motion or on an application made before it by an interested person."***

25.4 Vide its order dated 18.04.2011 in CASE No: HERC / PRO– 1 OF 2011, for generation tariff for the HPGCL, the Commission had noted that the HERC Tariff Regulations, 2008 in relation to Operation and Maintenance expenses are outdated and not updated. Further, the Commission vide the said order had not only deviated from the applicability of HERC Tariff Regulations, 2008 but has also allowed O & M Expenses as per CERC Tariff

Regulations, 2009 for the generation tariff for the HPGCL. Therefore LAPL is entitled to parity. The Commission since then passed similar tariff orders for HPGCL generating stations for the subsequent years allowing O&M expenses in accordance with CERC Tariff Regulations, 2009 containing reference of the said particular order.

25.5 The Commission passed the order dated 18.04.2011 on a petition filed by the HPGCL for determination of tariff for generating stations of the Respondent No.2/HPGCL for the year 2011-2012 wherein the Commission while determining the tariff of a 300 MW generating station has allowed O & M expenses of Rs. 17.88 lakhs per MW in accordance with CERC Tariff Regulations, 2009. The Commission while passing the said Order was of the view that adequate amount of O&M expenses is essential for deriving optimum efficiency from the plant and machinery. Hence, in the absence of updated HERC Generation Tariff Regulations, CERC Norms for unit size of 200 MW and above were adopted for FY-2011-2012 and subsequent years also.

25.6 The Commission had done away with the earlier methodology of computation of O&M Expenses based on capital cost and had framed the Regulation 28(5) in the HERC (Terms and Conditions for determination of Tariff for Generation, Transmission, Wheeling and Distribution and Retail Supply under Multi Year Tariff framework) Regulations, 2012 in consonance with the CERC methodology based on Rs. Lakhs per MW basis.

25.7 Adequate amount of O&M expenses is essential for deriving optimum efficiency from the plant and machinery as well as for the appropriate determination of the generation tariff of any power plant. Assuming that the capital cost actually incurred by LAPL i.e. Rs 1356.11 crores computed in accordance with HERC Tariff Regulations, 2008, was admitted by the Commission in its entirety, even then the O & M Expenses arrived at by applying Regulation 16(iv)(c) of the HERC Tariff Regulations, 2008 will come to a meagre amount of Rs 4.52 lakhs/MW for the year 2011-12 with 4% annual escalation for the subsequent years, which is much lower than the actual expenses incurred by the Unit II of LAPL i.e. Rs 14.67 lakhs/MW for the year 2011-12 and Rs 15.54 lakhs/MW for the year 2012-13.

25.8 As per CERC Tariff Regulations, 2009 the O&M Expenses granted are Rs 17.88 lakhs/MW for the year 2011-12 and Rs 18.91 lacs/MW for the year 2012-13, which are much higher not only than the O & M Expenses computed based on 1% of the capital cost admitted as per HERC Tariff Regulations, 2008. In view of the above, it was submitted by LAPL that it was entitled to relaxation/variation of the regulation 16(iv)(c) of the HERC Tariff

Regulations, 2008 during the re-determination of its interim tariff of Unit-II. This Tribunal in its judgment dated 03.01.2014 has recognized the need of a commercially viable tariff other than the levellized capped tariff of Rs. 2.32 /Kwh so that the Unit-II of LAPL can operate.

25.9 The Commission in the impugned order has acknowledged that O&M expenses of only Rs. 4.11 lakhs per MW computed based on the principle of 1% of capital cost as per HERC Tariff Regulations, 2008 stating that this Tribunal has directed O&M expenses to be determined as per HERC Tariff Regulations, 2008. It is evident that the O&M expenses approved by the Commission in the present case are much lower than the O&M expenses approved for HPGCL's generating stations. Further, the annual escalation in the O&M expenses as per HERC Tariff Regulations, 2008 is only 4% against 5.72% in the O&M expenses as per CERC Tariff Regulations, 2009. Due to above discriminatory approach adopted by the Commission, LAPL stands to **lose due to under recovery** of **O&M expenses** of **Rs. 41.28 crores** on an annual basis for a 300 MW Unit which is a significant amount for maintaining tariff viability of Unit 2. The Commission has itself acknowledged that this provision has not been updated and has since 2011-12 onwards allowed O&M expenses in line with the updated CERC Tariff Regulations, 2009 while determining the tariff of the state generating stations owned and operated by the HPGCL.

25.10 The Commission thus failed to appreciate that the present case was fit and appropriate for exercising their power to relax the applicable provision related to O&M expenses in the HERC Tariff Regulations, 2008. In the present scenario, it is not possible to operate and maintain a 300 MW generating station with such low O&M expenses allowed by the Commission. Therefore, LAPL is entitled to O & M expenses as per CERC Tariff Regulations and the impugned Order is required to be modified to this extent.

25.11 Reliance was placed by HPPC on the judgment of this Tribunal in '*The Tata Power Company Ltd. v. Jharkhand State Electricity Regulatory Commission (2012) APTEL 154*' (Paras 28, 29 and 32) to contend that power to relax must be exercised sparingly and for sufficient reasons. The said judgment in fact supports LAPL. In Para 29, the Tribunal has laid down the principles governing exercise of power of relaxation which are squarely applicable to the present case.

26. Submissions of Haryana Power Utilities in Appeal No. 117 of 2015:

Relaxation in Regulations for O&M Expenses

26.1 Lanco had claimed O&M expenses of Rs.17.88 lakhs/MW and 18.91 lakhs/MW for the years 2011-12 and 2012-13, respectively as per Regulation 19(a) of CERC Regulations, 2009 by seeking relaxation of Regulation 16 (iv)(c) of the HERC Regulations, 2008.

26.2 The position on the exercise of power to relax is well established. Such a power to relax is discretionary and can only be exercised in exceptional circumstances where there is sufficient reason justifying relaxation of norms provided for in the applicable Regulations. Further, it has to be established by the party claiming relaxation that no such circumstance has been created due to acts of omission or commission, attributable to it.

26.3 Haryana Utilities have stated that Lanco had sought relaxation of Regulation 16(iv)(c) of the HERC Tariff Regulations, 2008 by considering the O&M expenses as per Regulation 19(a) of the CERC Regulations 2009. It is submitted that such relaxation was neither permissible nor justifiable in the circumstances of the instant case. Lanco also failed to discharge the burden to establish the fact that circumstances for claiming relaxed norms were on account of reasons not attributable to Lanco. Reference in this regard be made to the decision of the Tribunal in The Tata Power Company Ltd. –v- Jharkhand State Electricity Regulatory Commission (2012) APTEL 154.

26.4 It is submitted that the manner in which Lanco incurred higher O&M expenses is imprudent and without supporting documentation and data. Consequently, the fact that it incurred higher O&M Expenses as against that contemplated under the norms specified under the HERC Regulations 2008 is clearly attributable to it and it is not entitled to claim any relaxation of the said norms.

26.5 Additionally, the Tribunal had vide its judgment and Order dated 03.01.2014 also directed the State Commission to re-determine the tariff based on the HERC Regulations. Therefore, the question of relaxation of norms contemplated for O&M Expenses under the HERC Regulations 2008 and adopting the norms specified under the CERC Regulations 2009 did not arise.

26.6 It is submitted that the reliance placed by Lanco on the order dated 18.04.2011 passed by the State Commission for Respondent No. 2/HPGCL is incorrect and there is no parity or otherwise for seeking relaxation of the applicability of the HERC Tariff Regulations 2008.

26.7 Similarly, the comparison drawn by Lanco between the O&M Expenses allowed by the State Commission for generating stations of HPGCL and NTPC cannot be considered and applied to the facts and circumstances of the instant case.

26.8 The contention raised by Lanco that the O&M Expenses as well as the rate of escalation prescribed under the HERC Tariff Regulations 2008 was outdated and did not hold good in the present scenario as the State Commission while framing the HERC (Terms and Conditions for determination of Tariff for Generation, Transmission, Wheeling and Distribution and Retail Supply under Multi Year Tariff framework) Regulations, 2012 for the first control period which commenced from 01.04.2014 had done away with the earlier methodology of computation of O&M Expenses based on capital cost and framed the new Regulations in consonance with CERC methodology based on Rs. Lakhs per MW basis is erroneous and in any event does not entitle Lanco to claim relaxation of the applicability of the HERC Tariff Regulations 2008. Without prejudice to the above, it is further submitted that the CERC Tariff Regulations 2009 are anyhow on normative basis and therefore any claim contrary to the above norm raised by Lanco could not have been allowed in the first place.

27. Submissions of Lanco in Appeal No. 117 of 2015:

Disallowance of Rs. 5.93 Cr. on account of claim for cost of initial spares

27.1. The Commission disallowed the cost of Rs. 5.93 Crores for extra spares on the ground that the cost of initial spares in respect of all the packages other than Turbine Generator Island have not been separately mentioned and are included in respective packages and hence the cost of extra spares of Rs. 5.93 cr. should form part of O&M cost and cannot be booked to the Capital cost.

27.2 The finding of the Commission that cost of initial spares in respect of all the packages other than Turbine Generator Island have not been separately mentioned and are included in respective packages is factually incorrect inasmuch as LAPL had provided all details and

supporting data as well as documents in respect of cost of extra spares amounting to Rs. 5.93 Crores. Relevant portion is reproduced herein below:

"6.2 Supply (Ex-works) Contract with ZPPL
i) Extra Spares (refer Annexure-5 and Annexure-5.1)

- *Most of the additional Spares mentioned have been received at Site.*
- *The details provided by LAPPL in support of the claim towards extra spares supplied by Contractor is found to be in order.*

27.3 The Commission acknowledges and agrees that Lender engineer's cost over-run report stated that extra spares were procured for critical system special tools and plants for maintenance and to minimize the downtime. However, it failed to appreciate that the latter portion of the Lender Engineer's report which approves the cost towards the procurement of extra spares actually incurred by LAPL. The Commission also failed to consider that the details of expenditure as supplementary documents formed part of the said report. List of Spares along with details of pricing etc., is already on record.

27.4 The Order of the Commission is contrary to the position stated by LAPL in the affidavit dated 30.10.2014 with respect to justification that the Cost of Spare is within the limit of HERC Tariff Regulation, 2008.

28. Submissions of HPPC/HPGCL in Appeal No. 117 of 2015:

Disallowance of Rs. 5.93 Cr. on account of claim for cost of initial spares

28.1 The State Commission has correctly disallowed the cost overrun increase on account of procurement of extra spares as Lanco had failed to separately mention the cost of initial spares in respect of all the packages apart from Turbine-Generator Island. Further, in view of the fact that the extra spares were procured for critical system and special tools and plants for maintenance and to minimize the down time (as per the Lender's Engineer Report), the State Commission has not allowed the expenditure to form part of the capital cost and has made it a part of the O&M cost.

29. Submissions of Lanco in Appeal No. 117 of 2015:

Increase in Cost of Civil and Construction Works, Steel etc.

29.1 Total increase in Cost of Civil and Construction Work is 69.53 Crores out of which 52.91 Crores is disallowed. The detailed justification for allowing the claim has been given by LAPL under Para 20 and not being repeated herein.:

30. Submissions of HPPC/HPGCL in Appeal No. 117 of 2015: Increase in Cost of Civil and Construction Works

30.1 The Haryana Utilities have already made submissions on this aspect for rejection of total claim under Para 19 herein above and not being repeated. The same is reiterated. The claim of Lanco for 100% allowance is wrong for the reasons mentioned herein above.

31. Submissions of Lanco in Appeal Nzo. 117 of 2015:

Increase in Plinth Area in Residential Colonies: Rs. 6.38 Crores

31.1 The Commission has disallowed an amount of Rs. 6.38 Crores on account of increase in cost of residential colony of employees on the following grounds:

- The cost overrun for additional work in the Residential colony/Township is Rs. 6.38 cr for increase in Plinth area from 87800 Sqft to 146200 Sqft for increase in dwelling unit from 88 to 124.
- LAPL has neither furnished any justification for increase in the number of dwelling Units/plinth area in the Residential colony/Township nor this could be an essential requirement for the project. Hence Rs. 6.38 cr was disallowed.

31.2 The above finding is erroneous inasmuch as Lender's Engineer certified that during the execution, LAPL had requested EPC Contractor to increase the plinth area for better standard of living to their employees and number of dwelling units. The additional claim on account of above is certified to be in order by Lender's Engineer. The details of actual expenses as certified by Lender's Engineer are furnished. LAPL furnished clarification.

31.3 The finding that the '*increase in Plinth area from 87800 S qft to 146200 Sqft for increase in dwelling unit from 88 to 124 could not have been an essential requirement for the project*' is without any basis and material on record. There is no material or reason on record to state that the approval of the said cost by the Lender's Engineer was not proper or the said cost was incurred imprudently.

32. Submissions of HPPC/HPGCL in Appeal No. 117 of 2015: Increase in Plinth Area in Residential Colonies: Rs. 6.38 Crores

32.1 The State Commission has rightly disallowed the additional cost in regard to increased plinth area in view of non-furnishing of the justification for increase in the number of plinth area in the Residential Colony.

33. Submissions of Lanco in Appeal No. 117 of 2015:

Increase in Design, Engineering, Construction, Supervision & Pre-operative expenses

33.1 The Commission observes that the increase of Rs. 29.82 cr. in the pre-operative expenses is not only on account of general price rise but is also due to delay in commissioning of the Unit from September, 2009 to March, 2010.

Out of 29.82 Crores, Rs. 11.7 Crores is due to increase in inflation (price level) and Rs. 18.12 Crores are on account of cumulative effect of increase in price level and also due to extension in the pre-operative period from Sept, 2009 to March, 2010 on account of delay in synchronization of the Unit.

The judgment dated 24.07.2011of this Tribunal in MSPGCL Vs MERC was applied by the Commission and 9.06 Crores (50% of 18.12 Crores) was disallowed stating that delay due to earthquake was beyond the control of generator while diversion of Rotor from Unit 2 to Unit-1 was attributable to LAPL.

The deduction on the above basis is contrary to the HERC Tariff Regulations, 2008 inasmuch as admittedly LAPL has incurred the said cost, which was duly certified. Lender's Engineer certified that due to increase in general price level and inflation rate, there is an increase in the preoperative expenses of 29.82 Crores The details of actual expenses as certified by Lender Engineer are furnished. LAPL also furnished clarification.

The Commission selectively relied upon the Lender's Engineer's report to hold that Rs 11.70 Crores is due to increase in inflation i.e. general price rise from September, 2006-September, 2009 however, conveniently chose to ignore the latter part of the approved cost i.e. 18.12 Crores.

Disallowance Rs. 24.93 Cr. towards increase in Interest During Construction ('IDC') before Synchronization.

33.2 LAPL claimed IDC to a tune of Rs. 90.96 Crores out of which increase of about Rs. 41.09 cr. was on account of increase in the interest rates on loans from 8.5% to weighted average interest rate of 12.09% during the original construction period from September, 2005 to

September, 2009. The balance increase of Rs. 49.87 cr. was due to cumulative effect of time extension due to Force Majeure events and due to increased weighted interest rate.

33.3 The Commission has allowed IDC of Rs. 41.09 Crores on account of increase in interest rate from September, 2005 to September, 2009. However, for balance Rs. 49.87 cr., which was incurred due to cumulative effect of time extension due to *force majeure* events and due to increased weighted interest rate, the Commission allowed 50% of the same and disallowed remaining 50% i.e. Rs 24.93 Crores on the ground that above said sum of Rs. 49.87 Crores was incurred on account of delay in synchronization of the Unit-II for which LAPL was partly responsible and therefore in light of the this Tribunal's judgment passed in Appeal No. 72/2010 LAPL is entitled to only 50% of the incurred IDC.

33.4 The deduction is contrary to the HERC Tariff Regulations, 2008 inasmuch as admittedly LAPL has incurred the said cost, which was duly certified. Further, the finding that LAPL was partly responsible for delay on synchronization is incorrect as stated hereinabove.

Disallowance of Rs. 4.72 Cr. towards increase in pre-operative expenses from Synchronization to COD:

33.5 The Commission disallowed Rs. 4.72 Crores towards increase in pre-operative expenses from Synchronization to COD on following grounds:

a. E&Y report states that O&M expenses incurred from 26.03.2010 to 31.03.2010 i.e., Rs. 12.48 cr. are exceptionally high and that the one major component considered in this O& M cost of Rs. 12.48 cr. is the net exchange fluctuation during the construction which is Rs 7.17 cr.

b. Balance O&M cost of Rs. 5.31 Crores is much higher considering that it is only for 6 days and the actual O&M expenses for the full FY 2010-11 are Rs. 35.69 cr. Therefore, O&M expenses worked out for 6 days as per pro-rata basis from actual expense of Rs. 35.69 Crores works out to be Rs. 0.59 Crores and accordingly balance 4.72 Crores is disallowed.

33.6 The deduction is contrary to the HERC Tariff Regulations, 2008 as per which LAPL is entitled to actual incurred cost. The cost has been admittedly approved by Lender Engineer's and the statutory auditor. The Commission does not hold that LAPL has not incurred the cost or that LAPL has imprudently incurred the cost and as such there was no occasion for the Commission to whimsically deduct the said cost.

34. Submissions of HPPC/ HPGCL in Appeal No. 117 of 2015:

Increase in Design, Engineering, Construction Supervision & Preoperative Expenses: Rs. 29.82 Crores

34.1 The Haryana Utilities reiterate the submissions made hereinabove and submit that the entire cost towards increase in design, engineering, construction supervision & preoperative expenses ought to have been disallowed by the State Commission. Though the State Commission has correctly applied the principles laid down in the judgment dated 18.10.2013 passed by this Tribunal in Appeal No. 57 of 2012 in disallowing the cost of Rs. 11.70 crores but while allowing the 50% expenditure of Rs. 18.12 crores towards pre-operative expenses has wrongly held that the pre-operative expenses had increased due to delay in synchronisation due to Chinese Earthquake as the same was beyond the control of Lanco. The Haryana Utilities submit that the entire 18.12 Crores ought to have been disallowed by the State Commission reiterates the submissions made hereinabove in regard to the Chinese Earthquake.

35. Submissions of Lanco in Appeal No. 117 of 2015:

Increase in IDC till Synchronisation: Rs 96 Crores

35.1 IDC is dependent on hard cost of the project which is decided along with the time duration of the Project and the applicable interest rate. The actual capital expenditure incurred upto the COD has to be considered as the completed capital cost in accordance with Regulation 12 of the HERC Tariff Regulations, 2008. Therefore, LAPL is entitled to the actual capital cost incurred by it. As stated above the increase in capital costs were on account of the reasons which were beyond the reasonable control of LAPL. The reasons of increase in capital cost have been duly explained in Para-B of its letter dated 13.01.2014 and the documents filed along with the same.

35.2 The Commission had also in its earlier order dated 02.02.2011 had agreed that earthquake did happen and was a force majeure. The Commission, however, concludes and agrees with the Lender's Engineer's report that synchronization of Unit-2 was delayed due to earthquake in China and diversion of rotor of Unit-2 for Unit-1 and states that though the first reason was clearly beyond reasonable control of appellant, the second reason can only be attributed to LAPL.

35.3 The second part of conclusion that the synchronization of Unit – 2 was delayed due to diversion of rotor of Unit – 2 for Unit – 1 is erroneous inasmuch as the Commission failed to appreciate that there was no challenge or denial to the factual and specific statement made by LAPL on affidavit which was filed pursuant to directions of the Commission. The said factual statements are as under: -

"On 31.01.2009, rotor of Unit-1 of LAPL failed during its synchronization. Accordingly, rotor of Unit-1 was sent back to OEM, China in March, 2009. As due to the factors i.e. earthquake of China and visa issues, the overall construction and erection activities of Unit-II got delayed, the rotor of Unit-II was used in Unit-I only for the month of April, 2009 and Unit-I was synchronized on 01.05.2009. At that time, Unit-II Turbine Generator erection activities had just started after March 2009 after the effect of earth quake in China had ceased and as per the project construction status of Unit-II, generator rotor was not required to be used immediately and it was expected to be used only after August 2009. The Generator rotor of Unit-I for use in Unit-II was dispatched from China on 04.06.2009 well in advance of its requirement for erection at site."

35.4 The said factual and unrebutted statements made by LAPL categorically show that the rotor was available for Unit-II much before it was required and use of rotor of Unit-II in Unit-I did not contribute any delay. The impugned order does not take this into account. The Lender's Engineer's Report in this regard is which was relied by the Commission ignoring the report of the Ernst & Young, independent Chartered Accountant appointed by Commission itself reads as under: -

"In view of the delay in the execution of the project due to Force Majeure event of earthquake in China, and delay in delivery Generator rotor of unit#1 (which was sent to China for repair and reuse in unit#2 to reduce the restoration period consequent to the damage of unit#1 steam turbine generator prior to oil synchronization on 30.01.09), the COD targeted in September, 2009 could not be achieved."

Nowhere the said Report, states specifically as to how much delay was caused because of diversion of rotor of Unit-II to Unit-1 and vice versa. The observation of Lender's Engineer's Report in this regard is too general and does not answer the specific dates mentioned in the submission of the appellant stating that no delay has taken place because of diversion of rotors.

35.5 The finding of the Commission that it is not inclined to accept that the visa issue of Chinese workers has also been a reason of delay in synchronization of the Unit-II is contradictory inasmuch as the Commission of the Impugned Order inter alia holds non-availability of expert Chinese engineers on account of change in Visa policy as cited in the order dated

09.02.2012 of CERC is one of the factors which caused delay in commercial operation of the Unit-II.

35.6 The Commission failed to appreciate that the lender's engineer report dated 23.04.2010 is general in nature and does not indicate all the reasons for delay in achieving the commissioning of the Unit-II and therefore the rejecting the visa issue of Chinese workers as a reason of delay in achieving commissioning of the Unit-II is wholly erroneous and incorrect especially when the Commission in its order dated 02.02.2011 has categorically held that the events of (i) earth quake in China and (ii) visa issue of Chinese workers did happen and the same was not disputed by HPGCL/HPPC. The Commission in order dated 02.02.2011 has held that the delay in commissioning of the Unit-II was on account of (i) earth quake in China and (ii) visa issue of visa issue of Chinese workers. The said finding of the Commission in the order dated 02.02.2011 admittedly was never challenged by the parties herein.

35.7 The observation of the Commission that LAPL has failed to submit lender's engineer report in respect of completed capital cost as on COD despite asking for the same is incorrect inasmuch as no such report was available with LAPL and as such there was no failure on part of LAPL. To substantiate the capital cost as on COD LAPL had already filed the duly certified auditor's certificate, which later on was independently verified by the Commission through E&Y .

Thus, the Commission has clearly erred in not accepting the rotor issue as a reason beyond the control of LAPL and has erred in deducting 50% of the IDC uptill the date of synchronization of Unit-2.

36. Submissions of HPPC/HPGCL in Appeal No. 117 of 2015:

Increase in IDC till Synchronisation: Rs 96 Crores

36.1 The State Commission has allowed Rs. 41.09 Crores on account of increase in the interest rates and 50% of Rs. 49.87 Crores on account of delay in synchronisation and balance 50% of Rs. 49.87 i.e. Rs. 24.93 Crores has been disallowed in view of the finding of the State Commission that delay in regard to earthquake was not attributable to Lanco and the delay on account of diversion of rotor from Unit 2 to Unit 1 was attributable to Lanco.

36.2 The entire Rs. 96 Crores and not just Rs. 24.93 (which Lanco is claiming) ought to have been disallowed in the light of submissions made hereinabove and submissions made in the Note of Arguments dated 25.01.2018 filed by the Haryana Utilities.

37. Submissions of Lanco in Appeal No. 117 of 2015:

Non-recovery of Fixed Charges corresponding to Home State share of 5% power supply to Chhattisgarh

37.1 LAPL is obliged to supply 5% to Chhattisgarh at variable rates as per Implementation Agreement. The fixed charges has to be recovered from 95% of capacity distributed between Haryana and Chhattisgarh in the proportion of 65:35%, which consist of interest on loan, interest on working capital, depreciation, O&M expenses, return on equity and income tax. These are the non-recovered fixed charges for the financial years.

2011-12	15.90 crore
2012-13	17.20 crore
2013-14	16.70 crore
2014-15	16.20 crore

In its reply to Appeal No. 117/2015, HPPC had stated as under:

"36. The appellant is expected to bear the risk and costs of such an obligation and is solely responsible for implementation thereof. It cannot claim any benefit by recovery of fixed charges for the balance 5% capacity. The question of recovery of fixed charges in any manner from HPPC for the State of Chhattisgarh's share of 5% does not arise. Even otherwise, the Appellant was required to supply power to Haryana Utilities and the Chhattisgarh State in the ration 65%:35% under the order passed by the Hon'ble Supreme Court dated 16.12.2011. In the circumstances, the fixed charges to be considered for determination of tariff for Haryana Utilities is directly proportional to the 65% capacity of power supplied from the 300MW Unit – II of the Appellant. The State Commission was perfectly justified in not allowing the said claim. All allegations to the contrary are denied."

37.2 In the tariff formats submitted vide letter dated 13.01.2014, LAPL claimed capacity/fixed charges towards host state share (Chhattisgarh) which is evident from the summary sheet Form-I.

37.3 The contention of HPPC during the hearing before APTEL that LAPL had signed Implementation Agreement with Government of Chhattisgarh on its own and it was not specified in the PPA dated 19.10.2005 between LAPL& PTC is factually incorrect. In fact, LAPL entered into an Implementation Agreement dated 01.08.2009 with the Government of Chhattisgarh, as it was a condition precedent to be satisfied by LAPL contained in

Clause 3.1.1 (ii) of the PPA dated 19.10.2005**.** Though the signing date of 01.08.2009 of the Implementation Agreement is after the date of signing of PPA of 19.10.2005, however, the PPA dated 01.08.2009 became effective only after the satisfaction of condition precedent by LAPL. It is important to note that the satisfaction of condition precedents by the Parties in the PPA was an important event for effectiveness of the PPA. In terms of the said Implementation Agreement, LAPL was obligated to supply 35% of the net power generated from its Unit 2 to Chhattisgarh State Power Trading Company Limited ("CSPTCL"), the nominated successor company of the Chhattisgarh State Electricity Board in lieu of various state facilities, clearances and permits etc. provided by the Government of Chhattisgarh. Thereafter, LAPL executed a PPA dated 12.01.2011 with CSPTCL detailing the terms and conditions for supply of 35% power from its Unit 2. Out of the total 35% power, 5% power was to be supplied at variable charges and the remaining 30% power was to be supplied at a total Tariff comprising of fixed charges and variable charges to be determined by the Appropriate Commission based on CERC Tariff Regulations. On the basis of the PPA dated 12.01.2011 executed by LAPL with CSPTCL, the APTEL in its interim order dated 23.03.2011 directed LAPL to supply 35% power to Chhattisgarh and supply balance power (65%) to PTC so that PTC can discharge its obligation to Haryana in pursuance of the PSA entered into between them

37.4 The concessional facilities such as govt. land at nominal rates, other state facilities, clearances and permits etc. provided by Govt. of Chhattisgarh to LAPL has actually helped in reduction of capital cost of Unit 2. The reduction in capital cost has directly helped HPPC by way of lower power purchase cost than it would have been the case when no concessional facilities would have been granted by Govt. of Chhattisgarh**..**The Commission has failed to appreciate that LAPL has been supplying power to the identified beneficiaries viz. 35% to Chhattisgarh and 65% to Haryana (through PTC) at regulated tariffs under the applicable CSERC/SERC regulations as per the directions of this Tribunal's interim order dated 23.03.2011 which was continued by the Hon'ble Supreme Court in its order dated 16.12.2011. LAPL has to supply the entire power from its Unit 2 to only these two state beneficiaries and cannot sell any power to any other third party without any further direction from the Hon'ble Supreme Court. As 100% capacity of Unit 2 is allocated to two states beneficiaries, LAPL does not have any spare power for merchant sale in this Unit 2 which implies that there is no possibility of recovery of fixed charges corresponding to 5% of 300 MW (15 MW gross capacity) which is to be supplied at variable charges only.

37.5 During the hearing, LAPL had cited Tariff Order issued by Jharkhand State Electricity Regulatory Commission (JSERC) (Refer page 22-23 and 83 of JSERC order dated May 2014 and page 64 of JSERC order dated 01.09.2016) in respect of Adhunik Power and Natural Resources Ltd. (APNRL), wherein JSERC held as follows:

"The Commission also notes that in case the Annual Fixed Charges are not allowed to be recovered from the balance capacity of 88%, the generating company shall be unable to recover the fixed charges corresponding to 12% of the capacity and the same shall lead to significant reduction in its return on equity.

37.6 During the hearing, the averment of HPPC that JSERC order deals with the issue involving hydro generation is factually incorrect. In fact, the said JSERC order is for APNRL which owns and operates a 2x270 MW coal based thermal power project in state of Jharkhand and not any hydro generation project as alleged by HPPC. In the case of APNRL, out of total 25% power to be supplied, 12% was to be made available at variable cost only and the balance 13% power was to be supplied at the total tariff (fixed charges+energy charges) to Jharkhand State Electricity Board (JSEB). Therefore, the supply of 12% power at variable cost by APNRL to JSEB can be considered to be similar to the supply of 5% power at variable cost by LAPL to CSPTCL, as they are supply at variable cost to the host states.

37.7 In a regulated tariff structure, a generator is allowed a nominal return of 14% on return on equity (in HERC Tariff Regulations, 2008) after meeting all the fixed expenses. As LAPL has an obligation to supply entire capacity of the Unit 2 (300 MW gross capacity) to two states beneficiaries viz. Chhattisgarh and Haryana (through PTC) at regulated tariffs, the annual fixed charges for the Unit 2 has to be recovered from the 95% capacity of the Unit 2 (5% capacity is at only variable charges). Therefore, LAPL is entitled to claim the fixed charges for the said 5% host state share from its Unit 2 to Chhattisgarh and Haryana (through PTC) in the proportion of 35%:65% respectively as directed by the Hon'ble Supreme Court in its order dated 16.12.2011.

37.8 Accordingly, either annual fixed charges corresponding to 5% host state share (15 MW gross capacity) need to be included in the total fixed charges of Unit 2 (as claimed by LAPL in its tariff formats) or the fixed charges of the Unit 2 need to be grossed up by 5%. The non-grant of the fixed charges corresponding to host state share of 5% power at variable charges by the Commission has resulted in substantial under recovery of fixed

charges of approx. Rs. 16.50 Cr. per tariff year, which is a significant amount for maintaining tariff viability of Unit 2 of LAPL's Project.

37.9 In view of the above submissions, the Appeal filed by HPPC deserves to be dismissed and the Appeal filed by LAPL deserves to be allowed by this Tribunal.

38. Submissions of HPPC/ HPGCL in Appeal No. 117 of 2015:

Non Recovery of Fixed Charges corresponding to the State of Chhattisgarh's share of 5% Power Supplied:

38.1 The claim for recovery of Fixed Charges corresponding to the obligation of Lanco to supply 5% power to the Government of Chhattisgarh at variable cost is misconceived and erroneous. Merely because Lanco under the Implementation Agreement dated 01.08.2009 executed with the State of Chhattisgarh was obliged to supply 5% of power at variable cost only, cannot be taken to mean that the fixed charges would have to recovered from 95% capacity of Unit II.

38.2 The PPA with Haryana Utilities is before the Implementation Agreement. There is no provision in the PPA or in the Regulations or in law providing for any such adjustments for 5 % Power. The obligation under the implementation Agreement is to the account of Lanco and there can be no adjustments made in the determination of fixed charges in view of the requirement to supply of 5% power to the State of Chhattisgarh at variable cost only.

38.3 Lanco is expected to bear the risk and costs of such an obligation and is solely responsible for implementation thereof. It cannot claim any benefit by recovery of fixed charges for the balance 5% capacity. The question of recovery of fixed charges in any manner from the Haryana Utilities for the State of Chhattisgarh's share of 5% does not arise. Even otherwise, Lanco was required to supply power to Haryana Utilities and the Chhattisgarh State in the ratio of 65%:35% under the order passed by the Tribunal dated 23.03.2011 and the order passed by the Hon'ble Supreme Court dated 16.12.2011. In the circumstances, the fixed charges to be considered for determination of tariff for Haryana Utilities is directly proportional to the 65% capacity of power supplied from the 300MW Unit II of Lanco. The State Commission was perfectly justified in not allowing the said claim. All allegations to the contrary are denied.

38.4 The reliance of Lanco on the order passed in May 2014 passed by the Jharkhand State Electricity Regulatory Commission (**JSERC**) are erroneous for the reason that the JERC in

that particular case was dealing with a issue involving hydro generation and the present case involves the tariff determination of thermal power. In the case of hydro, the Amendment dated 31.03.2008 to the Tariff Policy, 2006 provides as under:

"*(iii) Annual fixed charges shall be taken pro-rate to the saleable design energy tied up on the basis of long term PPAs with respect to total saleable design energy. The total saleable design energy shall be arrived at by deducting the following from the design energy at the bus bar:*

a) 13% of free power (12% for the host Government and 1% for contribution towards Local Area Development Fund as constituted by the State Government). This 12% free power may be suitably staggered as decided by the State Government

b) Energy corresponding to 100 units of electricity to be provided free of cost every month to every Project Affected Family notified by the State Government to be offered through the concerned distribution licensee in the designated resettlement area/ projects area for a period of ten years from the date of commissioning".

38.5 In terms of the above, the consideration of 12% free power in hydro power projects is completely different and cannot be relied by Lanco in the present case. No such regulations framed by the State Commission or policy notified by the Government of India exists for the Thermal Projects.

38.6 In view of the above, it is submitted that there is no merit in the Appeal filed by Lanco and the same is liable to be dismissed with costs. The impugned order is liable to be set aside on the Proposition of Haryana Utilities mentioned hereinabove.

39. Submissions of Lanco in Appeal No. 117 of 2015:

Under recovery of Energy Charges

39.1. The detailed explanations/justification of LAPL relating to the energy charges computations/under recovery, etc. are already given in Para 24. It is not being repeated here.

40. Submissions of Haryana Utilities in Appeal No. 117 of 2015:

Under recovery of Energy Charges

40.1 The detailed explanations/justification of Haryana Utilities relating to the energy charges computations/under recovery, etc. are already given in Para 23. It is not being reproduced here.

41. We have heard at length the learned counsel for the rival parties and considered carefully their written submissions, arguments put forth during the hearings etc. As the issues brought out in Appeal No. 107 of 2015 and Appeal No. 117 of 2015 are common and interlinked, hence, we consider and analyse the same by clubbing them together. The following issues arise for our consideration in the present appeal(s):

(A) Prudence Check of Project Cost
(B) Sharing/Apportionment of Common Assets
(C) Time and Cost Overrun, Force Majeure Events, etc.
(D) Infirm Power Adjustment
(E) Computation of Energy Charges
(F) Relaxation in Operation and Maintenance Expenses
(G) Non-Recovery of Fixed Charges Corresponding to Share of 5% Power Supplied to State of Chhattisgarh.

42. Our Findings and Analysis on the various issues involved in the case are dealt as under:

Issue No. 1: Prudence Check of Project Cost:

42.1 The HPPC and HPGCL in Appeal No. 107 of 2015 have brought out that in terms of remand order dated 03.01.2014 of this Tribunal , the State Commission was required to exercise proper and effective prudence check of the project cost and associated aspects before approving the claim on capital cost made by Lanco. In the process, the State Commission was required to see whether all the capital expenditures, as claimed, had in fact been incurred reasonably or prudently. They have further alleged that the State Commission has mechanically relied on the conclusions and findings contained in the reports of Ernst & Young (E&Y) and approved the capital cost despite the fact that they had not carried out any independent verification and have relied solely on the information provided by Lanco. The Haryana Utilities have further cited following Authorities in respect of the matters relating to prudent check:

(i) West Bengal Electricity Regulatory Commission vs. CESC – (2002) 81 SCC 715 - Hon’ble Supreme Court

(ii) Kerala State Electricity Board vs. Kerala State Electricity Regulatory Commission, A.No. 177 of 2009 of 13.01.2011 of APTEL

42.2 The Haryana Utilities have further indicated that the E&Y report has merely accepted the statements and information provided by Lanco and have drawn a presumption in favour of

its accuracy. They have also mentioned that the disclaimer given by the Consultant, E&Y, in the draft report submitted on 08.07.2014 clearly shows that the report should not have been considered as representing the truth. They have submitted that despite the repeated opportunities available with Lanco for placing necessary particulars, data and information in support of its claim for increasing capital cost, LAPL failed to remove the inconsistencies in the data. The State Commission failed to appreciate that the expenditure being supported by accounting vouchers for the purpose of the Companies Act, are not sufficient and the generating Company i.e. Lanco was required to establish: the need for capital expenditure in a structured manner, the total expenditure being reasonable, etc. They have further alleged that the State Commission has proceeded to decide the tariff issues by accepting the information submitted by Lanco or E&Y without undertaking the requisite prudence check. This has resulted into higher capital cost and higher tariff elements which would unreasonably increase the retail supply rate and adversely, affect the consumers in the State of Haryana, at large.

43. **Per Contra,** LAPL has submitted that pursuant to the Judgment dated 03.01.2014 of this Tribunal, they supplied the relevant details, information as well as documents to the State Commission on 13.01.2014. In that submission, Lanco also supplied details of apportionment of common facilities, time and cost overrun, etc.

43.1 In as much as the tariff was to be determined as per HERC Tariff Regulations 2008. The relevant regulation for determination of Capital Cost is Regulation 12 which states that *"the actual expenditure incurred on the date of completion of the project shall form the basis for fixation of tariff."* LAPL produced the Statutory Auditor's certificate certifying the actual capital cost incurred upto the date of completion i.e. the date of declaration of Commercial Operation of Unit-II which was 07.05.2011. Although objections were raised to the Auditor's certificate as well before the Commission, HPPC has not pursued and no argument was made on the same, before this Tribunal in the present proceeding.

43.2 In the hearing held on 25.03.2014, the State Commission felt that there was a need of external help from an Independent Chartered Accountant to have unbiased verification of figures and cost apportionment formula, in view of the contest being made by HPPC. Accordingly, with consent of the parties, the Commission agreed for appointment of an Independent Chartered Accountant having exposure in power sector preferably large power plants and not in any way connected to either Lanco and/or Haryana Power Utilities. It is

important to note that the task of identifying an independent Chartered Accountant was undertaken by the Commission itself and the Commission did not invite any proposal or sought suggestion from either of the parties. The Chartered Accountant was to be appointed subject to acceptance of both the parties. It was further envisaged and is so recorded in the order that the Chartered Accountant shall submit a report to the Commission within three weeks from the date of additional data/details to be made available by LAPL.

43.3 The Commission held a hearing on 20.05.2014 especially for taking consent of the parties on appointment of Ernst &Young as Consultant who was selected by Commission itself. In the hearing representatives of LAPL, HPPC and E&Y were present. Representatives of both the parties i.e. LAPL and HPPC gave their consent to appointment of E&Y. The Consultant (E&Y) proceeded with the scope of work assigned by the Commission and submitted a draft report on 08.07.2014**.** The said draft report was forwarded by the Commission on 09.07.2014 itself to the parties to invite their comments/objections within 7 days thereof. Whereas LAPL filed its objections to the report, HPPC admittedly did not raise any objection to the report within the time period prescribed and raised objection belatedly. LAPL also filed its written submission on 25.07.2014.

43.4 Admittedly, the HPPC has failed to bring on record any material or shred of evidence to show that E&Y has any conflict of interest with LAPL or even with Lanco Group. The Order dated 25.03.2014 records that the Chartered Accountant should not be connected either to LAPPL and/or Haryana Utilities. This Order was passed with the consent of parties. The affidavit of E&Y is therefore is in line with the Order. HPPC's insistence that E&Y should have given an affidavit as regards 'Lanco Group's is not only contrary to its consent recorded in the Order dated 25.03.2014 but also otherwise, misconceived inasmuch as the tariff was being determined of Lanco Amarkantak Power Ltd., which is one of several companies (around 100) of Lanco Group. In fact, HPPC has failed to bring any material on record to even remotely substantiate its allegation of conflict of interest of E&Y with Lanco group.

43.5 The other objection raised by the HPPC to E&Y's report is that it contains disclaimers. A perusal of the Disclaimer would reveal that the disclaimers are general in nature, which any report of this nature prepared by any professional would contain. The purpose and objective of disclaimer is to insulate oneself from a possible legal action by any of the parties. E&Y has acted in a professional capacity and like any other professional it would

not like to expose itself to any claim by either of parties and has therefore given disclaimer in the report. The disclaimer has to be read as a whole and not in a selective manner as sought to be done by HPPC.

43.6 Apart from stating that E&Y has not carried out an independent verification and has proceeded to base the report on the representation given by LAPL instead of making independent assessment, HPPC has not pointed out any specific issue as regards any flaw or errors in the E&Y report. HPPC emphatically states that the information provided by LAPL was not complete and skewed without pointing out which information it is referring to. Repeatedly it was argued by HPPC that E&Y has simply relied upon the information given by LAPL and Commission has mechanically relied upon the findings and conclusion of E&Y. It is further contended that the Commission has proceeded to accept and approve the claims regarding capital cost without independent verification. As to which claim has been accepted wrongly and how has E&Y failed to carry out independent verification is not pointed out specifically at all by HPPC.

43.7 The judgments cited by HPPC on prudence check lay down the principle that even if the Auditor certifies the cost as having been genuinely incurred, the prudence behind incurring the cost is to be ascertained by the Commission. Hon'ble Supreme Court in *West Bengal Electricity Regulatory Commission v CSEC (2002) 81 SCC 715* held that *"However, we hasten to add that the Commission is bound to give due weightage to such accounts and should not differ from the same unless for good reasons permissible in the 1998 Act."* In the present case, the Statutory Auditor's certificate certifies that Rs 1,168.37 crores was incurred on Unit-II. There is no challenge as far as the genuineness of the said amount having been incurred is concerned. The entire challenge laid by HPPC right from the beginning is the prudence in incurring the said amount. As regards the prudence in incurring the said amount, the Commission has conducted a detailed exercise. The task of prudence check was conducted by the Commission itself in the impugned order. HPPC is thus pointlessly assailing the impugned order on a completely fallacious premise that the Commission has not conducted prudence check and has mechanically relied on the report of E&Y.

44. Our Findings

44.1 Before analysing the issue of prudence check on project cost, let us recall the directions given by this Tribunal in its order dated 03.01.2014 in Appeal No. 65 of 2013, reproduced below:

i. '*62.Of course, we agree with Haryana Power (R2) that the State Commission has to apply prudence check in determining the capital cost based on the audited accounts. We find from the impugned order that adequate materials were not available before the State Commission to verify the capital cost incurred on Unit No. 2 of the Appellant…………….*

ii. *63. Therefore, we direct the Appellant to submit the necessary details of capital cost of Unit No. 2 including apportionment of cost of common facilities and detailed reasons for time and cost overrun of the Project before the State Commission to enable the State Commission to apply prudence check and determine the capital cost according to its own Tariff Regulations. The State Commission in turn shall determine the capital cost as per its Regulations after the requisite details are furnished by the Appellant.*'

44.2 In pursuance of the above directions, the State Commission proceeded with the in-depth appraisal of various items constituting the project cost and in accomplishment of the same, they engaged the services of reputed Consultant, namely, Ernst and Young (E&Y). In view of the voluminous work, including project cost, the State Commission felt appropriate to take assistance of the Consultant. **In fact Section 91(4) of the Electricity Act, 2003 also provides as under:**

"Section 91 (4): The Appropriate Commission may appoint consultants required to assist that Commission in the discharge of its functions on the terms and conditions as may be specified".

44.3 As provided in the statute, the State Commission appointed E&Y after taking concurrence of all the involved parties. In fact, this is a general practice being adopted by various Commissions including CERC to appoint external Consultant for detailed examination/analysis of particular issues and consider such report as an input to them for arriving at optimum & logical conclusion. In view of the repeated allegations of Haryana Utilities in their submissions, we have perused the 'Disclaimer' as well as 'Affidavit' submitted by the concerned Consultant i.e. E&Y and noted that these documents are general in nature and often submitted by the Consultants, by and large, in the same fashion. The Haryana Utilities have not cited any specific point on the basis of which credibility, conflict of interest, competence, etc. of E&Y could be brought under the cloud of doubt.

Further apprehension expressed by the Haryana Utilities regarding prudence check by the State Commission does not appear on proper footing. The State Commission has taken sufficient time and has made sincere efforts in analyzing all the pros and cons before accepting the final project cost and other associated aspects. The State Commission has also recorded their views on this issue in the impugned order as under:

"7.4 In addition to the above E&Y submitted addendum to their report as well as undertook site visit and submitted a report on the same. Further, as already stated, E&Y also replied to various queries of the Commission in respect of capital cost, coal cost etc made vide e-mail dated 31.10.2014 and note to the clarifications furnished in response to the additional queries of the Commission. In view of above and to address the apprehension of HPPC in this regard, the Commission would like to make it very clear that report submitted by E&Y has been just another input for determination of tariff amongst a large number of inputs received in the Commission in the form of pleadings (both written & oral) in a number of hearings held in the present case. Consequently, the Commission was bound to apply its own mind including prudence check to all the claims of LAPL and records available in the Commission rather than base its judgment solely on the report submitted by E&Y. Further the Commission did satisfy itself in the hearing held on 28.07.2014 that E&Y carried out the assignment in accordance with the scope of work as per the contract and further directed E&Y to submit an addendum in respect whatever doubts/quarries that still remained as well as to undertake site visit which was complied with by E&Y as already stated above."

44.4 **While taking note of the views indicated in the impugned order of the State Commission, we find that the State Commission has gone through the voluminous data and details submitted by Lanco, Haryana Utilities and the Consultant (E&Y) carefully and has applied prudence check over the same and arrived at the conclusion in the right spirit. The net capital cost of Unit-2 as Rs. 1235.28 crores adopted by the State Commission for tariff computations appears to be quite reasonable and also, comparable with the net capital cost for Unit-1 of LAPL of Rs 1236.40 crores determined by the Madhya Pradesh Electricity Regulatory Commission in its order dated 27.04.2011. The worked out cost index as Rs. 4.12 crores/MW for 300 MW unit size is considered quite reasonable & attractive in the time frame of 2010-11. Hence, we conclude this issue that the State Commission has applied prudence check on the cost and other associated aspects of the project satisfactorily and undisputable.**

45. Issue No. 2: Sharing/Apportionment of Common Assets

45.1 The Haryana Utilities have contended that there are many common/shared assets among the 6 units of Lanco having a total capacity of 3240 MW. Therefore, the cost of such

common facilities may be apportioned to Unit-2 (300 MW) to the extent of not more than 10%. They have further indicated that even if Unit 5 & 6 are ignored, there is no basis for not taking into account the development of Unit 3 & 4 at the same place and the share of common facilities chargeable to Unit 2 should be about 15.62 percent considering total installation of 1920 MW. The Haryana Utilities have further claimed that it would be imprudent on the part of any generating company including Lanco to have separate and independent assets like Ash Pond, Railway Siding, Water Intake System & Water Reservoir, Coal Handling Plant, and Switchyard etc. for each of the generating units. They have further submitted that when several generating units at the same site are planned, the principle of economies of scale is to be applied and implemented. However, the State Commission has wrongly held that there are no common assets of Unit 1 & 2 which are shared or will be shared with Unit 3 & 4. The Haryana Utilities have made reference to the Judgments of this Tribunal relating to the sharing of common assets in the following cases:

A. THDC India Limited –v- Central Electricity Regulatory Commission (Order dated 29.05.2015 passed in Appeal No. 103 of 2014).

B. M/s Raj West Power Limited, Jaipur –v- Rajasthan Electricity Regulatory Commission, Jaipur and Ors. 2012 ELR (APTEL) 0069.

45.2 The Haryana Utilities have also submitted that in addition to the above assets, some other assets are also common and are likely to be shared between Units 1 & 2 and Units 3 & 4 such as existing roads, administrative building, service building, fire station, field hostel and drainage system, etc. They have highlighted that the total land for Unit 3 & 4 has been shown in the E&Y report as 570.71 acres and the total land for units 1 & 2 has been indicated as 766 acres. The major land as per the CEA guidelines is for the ash disposal area, township, corridors for ash slurry, raw water, coal and water reservoir. It is not disputed that the super-critical main plant area will require lesser land as compared to sub-critical main plant area. However, there will be no difference in the issue of land for facilities like railway siding, ash pond, water reservoir etc. If the indicative land requirement under the CEA report is taken, the land for the three facilities which have been separately mentioned itself works out to 600 acres. It is, therefore, impossible for Lanco to construct 2 x 660 MW Thermal Power Station in the remaining land. The Haryana Utilities during the course of proceedings in this Tribunal on 06.02.2018/08.02.2018 have highlighted that land requirement indicated by Lanco for Units 3 & 4 works out to about 62 percent only against the CEA's estimated land. Keeping all the submissions regarding land

requirement for Units 1 & 2 and Units 3 & 4, the Haryana Utilities have reiterated that Lanco has been taking a wrong stand in respect of common assets among various sets of units and the State Commission has also not applied prudence check in their finding on this issue.

46. **Per Contra,** Lanco has submitted that there are no common facilities between Units 1 & 2 on the one hand and Units 3 & 4 on the other hand. Lanco has further indicated that Unit 3 & 4 (2x660 MW) are being set up separately from Unit 1 & 2 and the said units are in construction phase only whereas Units 1 & 2 is already operational. It is brought out by them that Unit 1 was conceptualised, planned and achieved financial closure on 20.09.2005 much prior to financial closure of Unit 2 (15.09.2006). It has further been brought out by them as well as E&Y in its report that the only physical connection between electrical/mechanical/coal/water systems of the existing plant and the new plant is the planned interconnection between the two 400 kV switchyards, which are separated by a fence and have their own control rooms and evacuation arrangements. This connection gives a flexibility of operation and does not amount to sharing the assets of the existing plant (Units 1 & 2) with the new plant (Units 3 & 4). Regarding sharing of land, the finding of E&Y in their report is reproduced below:

"4. Land: Unit 2 has been built partly on the green belt area for Unit 1. Additional land has been acquired to leave mandatory green belt for units 1&2 taken together. Since 200 acres has been attributed to Unit 2 and 566.89 acres to Unit 1, the cost of land considered for Unit 2 is less than half of the total for Units 1& 2 taken together.

It is our understanding that in a similar manner, part of the green belt earmarked for Unit 2 has been used for Units 3&4.Later an equal amount of the land which was taken from Unit 2 green belt area for Units 3&4 was transferred back to unit 2 from the land acquired for Units 3&4.

46.1 Lanco has further indicated that Unit 1 started generation on 01.05.2009 when it was synchronized with the Grid and achieved CoD on 09.04.2010 and Unit 2 was synchronized to the Grid on 22.02.2010. The financial closure of Units 3 & 4 was achieved in March 2011 that is much after the completion of units 1 & 2. Lanco has further mentioned that Unit 1 was independently conceived and planned on standalone basis. The contention of Haryana Utilities is that the principles of economies of scale are to be applied where several generating units are planned and implemented. In the present case Unit 3 & 4 were planned 5-6 years after unit 1 & 2. Lanco has further claimed that the reliance placed by HPPC on two judgments of this Tribunal are misplaced, as the principle of apportionment

of common facilities pertained therein would apply where stage wise, unit wise, line wise or sub-station wise breakup of the capital cost is not available in case of ongoing projects. Lanco has refuted the contention of Haryana Utilities and brought out that such planning of common assets could be possible only when all units are sanctioned/taken up simultaneously.

46.2 Lanco has stated that the Haryana Utilities have placed on record and reliance placed on the report of CEA titled "Review of Land requirement of Thermal Power Station issued in September, 2010. HPPC has compared the land requirement of 2X500 MW with land requirement of Units 3&4 (2X600 MW) to contend that the total land requirement is 1090 acres which is much more than the land requirement indicated by Lanco for comparable capacity Units 3&4 as 570.71 acres. HPPC contends that land requirement for Units 3&4 is considerably less then what it should be inferred that Units 3&4 are using land and common facilities of Units 1&2. Lanco has contested that such a comparison is not justifiable as it is evident from the report itself. The CEA report shows that the land requirement has been assessed on four broad parameters, namely, unit size, number of units, type of coal (indigenous or imported) and location (pit-head or coastal). The report records that besides these, there are other site specific issues which determine the land requirements The report also shows that the area for corridors for raw water intake, ash slurry pipeline & MGR/coal conveyors would vary for plant to plant depending on the distance of ash pond from the plant, distance of railway track from the plant and distance of raw water intake point from the plant etc. Further, Lanco has indicated that in case of unit 3, the area being utilized for the facilities outside the power plant boundary that is ash disposal area, township, corridor for ash slurry, raw water and coal etc. are much lesser than the requirement estimated in the CEA report. Moreover, the CEA report serves only as guidelines and, therefore, in the last para in the foreword, there is written *"land requirement in this report will serve as useful guidelines to government agencies, utilities and power plant developments for meeting the optimum utilization of land*".

47. Our Findings

47.1 We have gone through various details given by rival parties in their submissions/arguments, pertaining to the sharing/apportionment of common assets. Generally, the common facilities linked to the power projects such as land, colony, roads, water intake system/reservoir, railway siding, coal handling plant, ash pond, etc. are

planned and implemented in an integrated and comprehensive manner so as to optimise the same to arrive at economies of scale. However, this integrated approach and optimization is possible only when all the units of the Thermal Power Station are planned and taken up for construction simultaneously. The other factor which is also important in such planning is that the generating units are of same type and identical capacity. We note that in the instant case, there has been a large gap in conceptualizing different sets of units to the tune of 5-6 years. The unit 1 was taken up during 2005-06 and unit 2 during 2006-07 whereas unit 3 & 4 were planned 5-6 years later. Further, size of unit 1 & 2 was 300 MW and that of unit 3 & 4 as 660 MW. Considering the type and size of two sets of generating units and considerable gap in planning and implementation of different units, the concept of integrated planning of the power plant emerges to be a remote possibility. This aspect has been analyzed by the State Commission in detail in the impugned order while concluding that there are no common facilities between units 1 & 2 on the one hand and units 3 & 4 on the other hand. It is also reflected from the following:

(i). Unit-1 was independently conceptualized planned and executed and common facilities were created for Unit-1 on standalone basis. Thereafter existing facilities of Unit-1 were augmented to cater to the requirements of Unit-2. This fact has never been disputed by HPPC at any stage.

(ii) The existing common facilities of Unit-1 & 2 have been designed for a capacity of 2X300 MW and the same cannot be used/shared with Units 3&4 and for that matter with Units 5&6 which are of much larger capacity i.e. 660 MW each. It has to be kept in the mind that the period of start and completion of all these units are different. There is a gap of 5-6 years between start of construction of Units 1 & 2 and Units 3 & 4. The approvals and permission etc. for all the units namely the Environmental Clearance, consent to establish, approval for drawing water, approval from railway authorities are admittedly separate for each of the units and granted at different times. None of these facts have ever been disputed by HPPC.

(iii). Pursuant to actual site visit, E&Y reports records a categorical factual finding that *"The capacities of existing facilities designed for 2X300 MW generation capacity does not allow them to be used for a much larger 2X 660 MW capacity of new plant i.e. Units 3&4. The layouts of the existing plant (Units 1&2) and that of the new plant (Units 3&4) also do not allow the existing BOP facilities for Units 1 &2 to be used for Units 3 & 4.*

(iv). Pursuant to the site visit, E&Y report records a categorical factual finding that *"It is also found on site visit that the only physical connection between electrical/mechanical /coal/water systems of the existing plant and the new plant is the planned interconnection between the two 400kV switchyards, which are separated by a fence and have their own control rooms and evacuation arrangements. This connection gives a flexibility of operation and does not amount*

to sharing the assets of the existing plant (Units 1 & 2) with the new plant (Units 3 & 4)."

(v). E&Y further gives a categorical finding in the report that common facilities exist only between Units 1&2, as *"1. Balance of Plant (BOP) facilities of the existing 2x300MW plant is shared between Units 1 & 2.*

47.2 The contention of the Haryana Utilities is that the cost of common facilities should be apportioned to the tune of 10% (total installed capacity 3240 MW) or otherwise 15.62% (total installed capacity 1920 MW). This arithmetical proportion could be possible in an ideal case when all the generating units of the power plant are conceptualized/implemented simultaneously and also all the units are identical in type and size. With only these pre-requisite, the power plant can be planned and implemented in an integrated way to realize the economies of scale. The case cited by the Haryana Utilities is of a Hydro Electrical Power Plant (THDC). It is significant to note that the cost apportionment pertaining to hydro project cannot be applied to a Thermal Power Station especially in the instant case.

47.3 **As detailed above, this is not being a situation in the present case where all the units have been planned and implemented in a sporadic way leaving no scope for optimization. Considering these details and analysis, we are of the opinion that there are no common facilities of unit 1 & 2 which are shared or shall be shared with unit 3 & 4. Further, while units 3 & 4 are still under construction, the planning & implementation of units 5 & 6 is not yet known.**

48. Issue No. 3: Time and Cost Over-run, Force Majeure Events, etc.

48.1 The Haryana Utilities have contended that Lanco is not entitled to claim any part of the IDC and IEDC or cost overrun on account of any time overrun for the alleged Force Majeure condition, namely, Earthquake in China as, affecting the implementation of the contract between the parties. The aspect of the implication of the above claim was considered by the State Commission in the Order dated 2.2.2011 passed in Case No. HERC/PRO-12 of 2010. The relevant extracts from the said Order, is as under:

"Having decided as above, the Commission examined the relevant provisions of the PSA/PPA to answer the issue of what relief can be claimed under the force majeure clause. The relevant clauses are mentioned below:-

….

A perusal of the above provision makes it clear that in an event of Force Majeure the parties are entitled for some relief in terms of extension in time for carrying out their respective contractual obligations. As far as the issue of compensating (in terms of tariff hike) for any consequential appreciation in Capital Cost is concerned, the Commission could not find any enabling provision in the PSA/PPA. Hence the second issue of whether any relief other than extension in time due to any Force Majeure event is admissible is answered in the negative i.e. no relief other than extension in time as explicitly provided in the PSA/PPA is admissible."

In terms of the above, the State Commission had considered the above event of Chinese Earthquake as Force Majeure only because of the provisions of Article 11.9(ii) contained in the Power Sale Agreement and more particularly in view of the fact that the Haryana Utilities had not contested the said claim of Force Majeure given by LAPL/PTC, at the relevant time.

48.2 The Haryana Utilities have further brought out that by construing the provisions of the Article 11.5 of the PPA and 11.6 of the PSA, the State Commission in the earlier order dated 2.2.2011 had categorically held that there can be no cost implication and as such there cannot be any cost overrun either on account of IDC or IEDC that can be considered. It was held that only time overrun, namely, suspension of the implementation of the contract can only be considered, on account of Force Majeure Event. The Haryana Utilities have contested that despite detailed submissions on the above aspect of frustration during the hearing and by way of written submissions, the State Commission has proceeded to allow IDC and IEDC or cost overrun holding the Chinese Earthquake as a Force Majeure Event in complete disregard to the Order dated 02.02.2011, the terms of the PSA/PPA and the settled principles of law on frustration of contract under Section 56 of the Indian Contract Act, 1872.

48.3 It has been claimed by the Haryana Utilities that the State Commission has wrongly proceeded on the basis that the finding of the State Commission contained in the Order dated 02.02.2011 cannot be considered by the State Commission as the Hon'ble Supreme Court vide its order dated 16.12.2011 had directed the State Commission to decide the dispute uninfluenced by any prior observations made by any authority in the matter. They have claimed that the Order dated 16.12.2011 passed by the Hon'ble Supreme Court was as an interim measure, till the main issue i.e., whether the State Commission has jurisdiction to determine the tariff or the Central Commission, is adjudicated by the Hon'ble Court.

48.4 The Haryana Utilities have alleged that the State Commission in approving the claim of IDC sought by Lanco of Rs.133.07 Cr from date of Synchronization till COD. has merely accepted the recommendation of the consultant, Ernst & Young, and inter-alia, held that since the benefit of net earnings from sale of infirm power is being passed on to the consumers by way of reduction of the completed capital cost to that extent, the IDC of Rs.133.07 cr., should be taken into account for determination of capital cost on COD. The error in the above finding of the State Commission is evident from the fact that the State Commission allowed the above claim of Rs.133.07cr in entirety after observing that the delay of 14 months in declaration of COD after synchronization cannot be solely attributed to non-availability of LTOA as contended by Lanco as the reasons for the delay were attributable to Lanco. In fact, the State Commission had initially observed that 50% of the IDC of Rs.133.07 Cr incurred from synchronization of the Unit-2 to COD needed to be disallowed.

49. **Per Contra,** Lanco has submitted that the said finding of the Commission contained in the Order dated 02.02.2011 as well as the contention of HPPC is premised on the position that there is no enabling provision for giving relief of cost overrun in the PPA. This Tribunal vide its judgement dated 03.01.2014 has directed re-determination of tariff dehors the PPA. Thus, the provisions of the PPA cannot be relied upon by HPPC. As per the said judgment of the Tribunal, the tariff is to be determined in accordance with the HERC Tariff Regulations, 2008, which provides that the capital cost on completion of the project shall be considered for tariff determination subject to prudence check.

49.1 On the aspect of *force majeure*, the Commission observes in the impugned Order as:- *"that the Hon'ble Supreme Court in its Order dated 16.12.2011 has held that 'the State Electricity Regulatory Commission, Haryana will decide the dispute uninfluenced by the observations made in the impugned Orders passed before today by the Appellate Tribunal and/ or any Authority in this case…' As such the Commission cannot rely on its Order dated 02.02.2011 to disallow overrun cost on account of increase in IDC as argued by the Respondents."*

49.2 Reliance placed by HPPC on Section 56 of the Contract Act is totally misplaced and misconceived. The performance of LAPL was delayed on account of factors beyond reasonable control which was duly explained by LAPL in its reply to memorandum of interrogatories dated 09.04.2014 filed in the Commission. It is settled law that in case delay in execution of a generating project occurs due to factors beyond the control of the generating company e.g. delay caused due to force majeure then the generating company is

entitled to benefit of the additional cost incurred due to time over-run. No impossibility was pleaded by LAPL, therefore the question of applicability of Section 56 of the Contract Act does not arise.

49.3 The Lanco has further contested that IDC is dependent on hard cost of the project which is decided along with the time duration of the Project and the applicable interest rate. The actual capital expenditure incurred upto the COD has to be considered as the completed capital cost in accordance with Regulation 12 of the HERC Tariff Regulations, 2008. Therefore, LAPL is entitled to the actual capital cost incurred by it. As stated above the increase in capital costs were on account of the reasons which were beyond the reasonable control of LAPL.

49.4 The Commission had also in its earlier Order dated 02.02.2011 had agreed that earthquake did happen and was a force majeure. The Commission, however, concludes and agrees with the Lender's Engineer's report that synchronization of Unit-2 was delayed due to earthquake in China and diversion of rotor of Unit-2 for Unit-1 and states that though the first reason was clearly beyond reasonable control of appellant, the second reason can only be attributed to LAPL.

49.5 In so far as the IDC of Rs 133.07 crores from date of synchronization to COD is concerned, the Commission although observed in the impugned order that *"going by the principles laid down in the ibid Order of the APTEL, 50% of the IDC of Rs. 133.07cr. incurred from synchronization of the Unit-2 to COD needs to be disallowed."* However, finally the Commission has rightly held that *"since the benefit of net earnings from sale of inform power is being passed on to the consumers by way of reduction of the completed capital cost to that extent, the IDC of Rs. 133.07 cr., in all fairness and in line with the recommendations of consultant E&Y, should be taken into account for determination of capital cost on COD."* This has resulted into enormous benefit to HPPC inasmuch as the earnings by sale of infirm power is much more than IDC incurred during the said period. If IDC for the said period is to be disallowed then earnings from infirm power i.e. an amount of Rs 311 crores approx., which is deducted from the capital cost will have to be added, thereby increasing the capital cost by an amount of Rs 180 crores approx.

50. Our Findings

50.1 While referring to the State Commission's order dated 02.02.2011, we note that the Commission had remarked that in an event of force majeure, the parties are entitled for some relief in terms of extension in time for carrying out their respective contractual obligations but any relief other than extension in time had been answered in negative. The said findings of the Commission has been revisited after the directions of Hon'ble Supreme Court in its Order dated 16.12.2011 which has held that the Commission will decide the dispute uninfluenced by the observations made in the impugned orders passed before by the Appellate Tribunal and/or any other Authority in this case. The State Commission has also relied on the Judgment dated 18.01.2013 of this Tribunal in Appeal No. 57 of 2012 between Maharashtra Power Generating Company Limited –v- Maharashtra Electricity Regulatory Commission and Others wherein this Tribunal has evolved principles for sharing of cost overrun arising due to time overrun. The various factors leading to time overrun in the commissioning of the project has been analysed and we find that the time overrun due to force majeure events of earthquake was caused beyond the control of Lanco and hence the cost overrun in terms of IDC/IEDC from the date of synchronization to CoD appears to be justified and deserves to be allowed to the generator. In this regard, Commission has rightly held that since the benefit of net earnings on the sale of infirm power is being passed on to the consumers by way of reduction of the completed capital cost in all fairness, the same should be taken into account for determination for capital cost for CoD. It is also noted that IDC for time overrun is far less than the earnings by sale of infirm power for the said period. This, in turn, would benefit to HPPC and consumers. **The other claims of Lanco on account of increase in cost of civil works, increase in plinth area in the colony, increase in design engineering and pre-operative expenses, etc. have been analysed by the State Commission applying judicious approach and keeping in view the judgment of this Tribunal dated 18.01.2013. The State Commission has followed the settled law & judgments and allowed only genuine and logical expenses and disallowed the other claims of Lanco which have occurred due to lapses and imprudence on the part of Lanco. We, therefore, agree with the findings and analysis of the Commission on time and cost overrun and in turn allowance/disallowance of various claims of Lanco.**

51. Issue No. 4 Infirm Power Adjustment

51.1 HPPC have alleged that Lanco did not give full details with supporting documents on the quantum of sale of infirm power for the period till 6.5.2011 from Unit No. 2. The audited accounts of Lanco indicates that there was a total sale of Rs1889.10 crores of power during the period 2009-10 to 2010-11 from both Units 1 & 2 i.e., prior to 7.5.2011. There has been further sale of infirm power from Unit No. 2 during the period 1.4.2011 to 6.5.2011. Further Unit No. 1 is represented to have been commissioned on 09.04.2010. The amount of Rs.1889.10 crores plus the sale of power from Units 1 & 2 for the period till 6.5.2011 was to be considered as the basic amount of sale of infirm power. The adjustment of Rs. 467.50 crores was made by MPERC as sale of infirm power from Unit-1.

Thus, as per the Haryana Utilities, an amount of Rs.1340.04 crores needed to be adjusted by the above value of infirm power. However, the State Commission vide the impugned judgment and Order dated 23.01.2015 has proceeded to mechanically accept the submissions of Lanco on the quantum of sale of infirm power at Rs.311.28 crores towards Unit No. 2, even though Lanco failed to provide any satisfactory evidence in support of its claim.

52. **Per Contra,** Lanco has stated that the net revenue generated from sale of infirm power after fuel expenses of Unit-II is Rs. 311.28 Crores from date of synchronization (22.02.2010) upto the declaration of COD (07.05.2011),which is reflected in the certificate issued by Auditor certifying the capital cost of Unit II. The benefit of reduced capital cost has been clearly passed on to the consumers of State of Haryana as the revenue generated from sale of infirm power from Unit-II has been deduced from the capital cost of Unit-II in accordance with HERC Tariff Regulations, 2008.

52.1 As per Lanco, HPPC is trying to mislead by quoting the consolidated financials of LAPL, which includes gross revenue from sale of power from Unit-I before and after COD of Unit I in addition to the sale of infirm power from Unit-II before its COD 07.5.2011. Unit I was synchronized on 01.05.2009 and its COD was declared on 09.04.2010 whereas Unit II was synchronized on 22.02.2010 and its COD was declared on 07.05.2011. The net revenue generated from sale of infirm power after fuel expenses of Unit-II is (Rs. 311.28 Crores) from date of synchronization (22.02.2010) upto the declaration of COD (07.05.2011) which is reflected in the certificate issued by Statutory Auditor certifying the capital cost of Unit-

II. The financial statements-as at March 31, 2012 along with Auditor's report were placed on record of HERC with the rejoinder dated 01.03.2014. The standalone financials of Unit-II certified by the Auditor for the period as on 25.03.2010, as on 31.03.2010, as on 31.03.2011 and as on 07.05.2011 were placed on record of HERC.

52.2 Furthermore, E&Y has also verified the details of infirm power pursuant to the directions of the Commission and found to be correct and in order.

53. Our Findings

We have gone through the rival contentions of the Haryana Utilities and Lanco in regard to adjustment of infirm power for Unit-2. In fact, HPPC has referred to the gross revenue from sale of power from Unit-1 before and after CoD of Unit-1, in addition to the sale of infirm power from Unit-2 before its CoD i.e. 7.5.2011. Unit-1 was synchronized on 01.05.2009 and its CoD was declared on 09.04.2010 whereas Unit-2 was synchronized on 22.02.2010 and its CoD was achieved on 07.05.2011. The net revenue generated from sale of infirm power after fuel expenses of Unit-2 has been worked out as Rs. 311.28 crores from the date of synchronization (22.02.2010) up to declaration of CoD (07.05.2011) which is reflected in the certificate issued by the Statutory Auditor certifying the capital cost of Unit-2. Accordingly, the final capital cost has been worked out by adjusting the sale of infirm power (Rs. 311.28 crores) and the benefit on account of this reduction in capital cost/tariff has been accrued to the Haryana Utilities'/consumers.

We, therefore, do not find any infirmity or anomaly in the findings of the State Commission regarding adjustment of infirm power and arriving at the net completed cost of the project. Just to repeat, the capital cost as finalized by the State Commission for computation of tariff is considered to be quite attractive for a unit size of 300 MW pertaining to the period of 2010-11.

54. Issue No. 5 Computation of Energy Charges

54.1 HPPC have contended that the State Commission should have restricted the fuel cost on the basis of the maximum of what would have been the cost of linked mine coal of Southern Eastern Coalfields (SECL) i.e., subsidiary of Coal India. The cancellation of supply from the linked mines on account of the termination of the PPA by Lanco and therefore being attributable to Lanco should be to the account of Lanco. The exorbitantly high cost of coal obtained from alternate sources, including e-auction, direct purchases, imported coal etc.

without any prior approval of the Haryana Utilities, should not be passed to the Haryana Utilities.

54.2 Haryana Utilities have further argued that the coal procured by Lanco from alternate sources including e-auction, direct purchases, imported coal etc., should be entirely at the risk and cost of Lanco. The price of linked mines coal has been in the range of about Rs. 1000 per M.T., whereas the price of eauction and other alternate source of coal has been in the region of Rs 3000 per MT {3 times costlier}. The coal linkage for the power plant was given by SECL to Lanco on the basis of the PPA entered into between Lanco and PTC India and the PSA entered into between PTC India and the Haryana Utilities i.e. based on the electricity being sold to Haryana.

54.3 SECL had subsequently terminated the FSA entered into with Lanco on the ground that Lanco had terminated the PPA with PTC India for generation and sale of electricity ultimately to be delivered to the Haryana Utilities.

55. **Per Contra,** Lanco has claimed that since 07.05.2011 when LAPL commenced power supply to PTC for onward supply to HPPC, there has been frequent downward revisions in the supply of linkage coal by SECL. In spite of financial hardships LAPL had tried its best to operate its Unit-II and supply power to PTC for onward supply to HPPC by procuring the balance requirement of coal from alternate sources (where the cost of coal was at least 3 to 4 times higher than the cost of linkage coal) without realization of a just and equitable tariff which was not even meeting its generation cost. It is an admitted position that LAPL was facing severe hardship on account of the increasing burden due to coal costs (in view of the reduced quantities of coal being supplied by the government undertakings in light of the New Coal Distribution Policy). The coal linkage from the SECL to LAPL had decreased from what was originally envisaged with the SECL i.e. 100% linkage coal.

55.1 In respect of the energy charges claimed by LAPL considering the actual coal cost incurred in its books of accounts, the methodology followed by the Commission is not in line with the applicable HERC Tariff Regulations, 2008 as LAPL was being supplied linkage coal from SECL to the extent of yearly average 27% PLF only with month-wise huge variations in supply due to reasons beyond the control of LAPL. In some months, there was no linkage coal supply by SECL. The linkage coal supplied by SECL was not even sufficient to run the plant even at technical minimum of 50%, there was always shortfall in linkage coal which was met by procuring coal from alternate sources viz. e-auction/open

market/imported coal. On a month to month basis, the coal stock at the beginning of the month was not sufficient to even generate power at technical minimum of 50% and supply power to the respective beneficiaries. LAPL had submitted all the supporting coal invoices to the Commission which were also independently verified by E&Y and the Commission.

55.2 The Commission has not appreciated that even if the linkage coal quantity supplied by SECL is in accordance with the modified New Coal Distribution Policy dated 26.07.2013, issued by Ministry of Coal for coal based thermal power plants across the country, it will suffice generation corresponding to only 55% Plant Load Factor. The applicable HERC Tariff Regulations, 2008, on the basis of which the Commission has re-determined the tariff vide the impugned order, commencing from the commercial operation date of Unit-II, provide for annual target availability of 80% to recover the fixed charges of the Unit. Therefore, even to attain the annual target availability of 80%, LAPL still requires to purchase at least 25% additional domestic coal from alternate sources such as e-auction or open market. Further, technically the domestic coal based unit has been designed to operate efficiently at optimum plant load factor above 85%.

55.3 In any regulated tariff structure, wherein the tariff is determined in accordance with the applicable regulations, the energy expenses are determined considering coal cost as pass through in tariff and therefore based on the actual weighted average landed cost of coal from all sources accordingly. Further, the Commission has been approving the above mentioned principle of actual weighted average landed cost of coal for the computation of variable energy charges in respect of the thermal generating stations owned and operated by the HPGCL. This position has been deviated from by the Commission in the present case.

56. Our Findings

56.1 The Haryana Utilities have contended that energy charges applicable to them should have been restricted as per the fuel cost on the basis of cost of coal from linked mine of Southern Eastern Coalfield (SECL) and high cost of coal from alternate source should have been entirely at the risk and cost of Lanco and in any way not passed on to the Haryana Utilities.

56.2 Lanco has stated that they were being supplied linkage coal from SECL to the extent of yearly average 27% PLF only with month-wise huge variations. They have further submitted that the linkage coal supply by SECL was not even sufficient to run the plant at

technical minimum of 50%. We note that the Commission in the impugned order has considered the consumption of costlier coal for UI energy (some power was sold as UI) in the first instance and consumption of balance coal (including linkage coal) for supply of power to CSPTCL (Chhattisgarh) & HPPC (Haryana) based on the scheduled energy for the period commencing from 07.05.2011 to 30.06.2012. However, w.e.f. 01.07.2012, the costlier coal was considered for UI energy & Chhattisgarh and balance coal was considered for Haryana. While considering the utilization of balance coal (linkage / e-auction/ Open market/ Imported) for Haryana's share of power supply, linkage coal was considered to be first utilized to the full extent and then balance normative consumption was adjusted against e-auction, open market and imported coal in the same order of preference.

56.3 **We have analysed the contentions of both the parties and find that the State Commission has adopted judicious approach to strike a balance between the generator (Lanco) on the one hand and retail supplier/distributor (HPPC/HPGCL) on the other. In such circumstances, the computation of energy charges carried out by the State Commission is considered just and appropriate. We, therefore, agree with the State Commission on the methodology adopted for computation of energy charges.**

57. Issue No. 6 Relaxation in Operation and Maintenance Expenses

57.1 LAPL has submitted that they had filed an application dated 04.02.2014 under Regulation 33 of the HERC Tariff Regulation, 2008 seeking relaxation of Regulation 16(iv)(c) of the said Regulations concerning O&M expenses and to grant O&M expenses for Unit-II as per CERC Tariff Regulations, 2009. Without prejudice to the above and in alternative LAPL prayed for grant of O&M expenses at least as per actual expenditure incurred by it. Cogent reasons were given to relax the regulations, as is evident from the averments made in the application and documents filed along with. The Commission, however, rejected the prayer made in the said application and disposed of the application for the reason that this Tribunal had directed for the interim tariff to be determined by applying HERC Regulations 2008. Specific reference is made by the Commission to the Order dated 03.01.2014 of this Tribunal to hold that O&M expenses should be determined as per the Tariff Regulations of the State Commission.

57.2 Lanco have contended that the Commission, however, failed to appreciate that the HERC Tariff Regulations, 2008 itself contain a provision for relaxing the said regulations i.e.

Regulation 33 and this was a fit case to invoke the said provision. The power to relax is conferred by the statutory regulations and this power has not been taken and cannot be taken away by the judgment dated 03.01.2014 of this Tribunal. The judgment dated 03.01.2014 of the Tribunal never meant that power of relaxation shall not be exercised by the Commission under any circumstances.

Regulation 33 reads as under:-

> ***"Regulation 33: – The Commission, for reasons to be recorded in writing, may vary any of the provisions of these regulations on its own motion or on an application made before it by an interested person."***

57.3 Lanco has pointed out that the Commission passed the order dated 18.04.2011 on a petition filed by the HPGCL for determination of tariff for generating stations of the Respondent No.2/HPGCL for the year 2011-2012 wherein the Commission while determining the tariff of a 300 MW generating station has allowed O & M expenses of Rs. 17.88 lakhs per MW in accordance with CERC Tariff Regulations, 2009. The Commission while passing the said Order was of the view that adequate amount of O&M expenses is essential for deriving optimum efficiency from the plant and machinery. Hence, in the absence of updated HERC Generation Tariff Regulations, CERC Norms for unit size of 200 MW and above were adopted for FY-2011-2012 and subsequent years also. Relevant extract of Order dated 18.04.2011 of the Commission is reproduced hereunder:-

> ***"The Commission is of the considered view that adequate amount of O&M expenses is essential for deriving optimum efficiency from the plant and machinery. Hence, in the absence of updated HERC generation tariff regulations, CERC norms for unit size of 200 MW & above have been adopted for FY 2011-12. For the remaining generating stations of lower than 200MW capacity, where CERC norm does not exist, the basis of estimating O&M expenses is the O&M expenses allowed by the Commission in FY 2009-10 escalated by 5.72% per annum to arrive at O&M expenses to be allowed in FY 2011-12. The escalation factor considered is as per CERC notification. Accordingly, the Commission allows O&M expenses @ Rs. 2.94 million / MW for PTPS (1-4), Rs. 2.034 million/MW for PTPS (5 to 8), Rs. 1.788 million/MW for DCRTPS and Rs. 1.308 million/MW for RGTPS (1&2). While the O&M expenses allowed by the Commission in the case of WYC & Kakroi have been approved as proposed by HPGCL."***

57.4 The Commission thus failed to appreciate that the present case was fit and appropriate for exercising their power to relax the applicable provision related to O&M expenses in the HERC Tariff Regulations, 2008. In the present scenario, it is not possible to operate and

maintain a 300 MW generating station with such low O&M expenses allowed by the Commission. Therefore, LAPL is entitled to O & M expenses as per CERC Tariff Regulations and the impugned Order is required to be modified to this extent.

57.5 Reliance was placed by HPPC on the judgment of this Tribunal in *'The Tata Power Company Ltd. v. Jharkhand State Electricity Regulatory Commission (2012) APTEL 154'* (Paras 28, 29 and 32) to contend that power to relax must be exercised sparingly and for sufficient reasons. The said judgment in fact supports LAPL. In Para 29, the Tribunal has laid down the principles governing exercise of power of relaxation as under, which are squarely applicable to the present case:-

> ***"29. The principles relating to the exercise of power of relaxation laid down in the above decisions referred to above are as follows:***
>
> ***(a) The Regulation gives judicial discretion to the Commissions to relax norms based on the circumstances of the case. Such a case has to be one of those exceptions to the general rule. There has to be sufficient reason to justify relaxation which has to be exercised only in the exceptional case where non-exercise of the discretion would cause hardship and injustice to a party.***
>
> ***(b) If there is a power to relax the regulation, the power must be exercised reasonably and fairly. It cannot be exercised arbitrarily to favour some party and to disfavour some other party.***
>
> ***(c) The party who claims relaxation of the norms shall adduce valid reasons to establish to the State Commission that it is a fit case to exercise its power to relax such Regulation. In the absence of valid reasons, the State Commission cannot relax the norms for mere asking. When the State Commission has given reasoned order as to why the power for relaxation cannot be exercised, the said order cannot be interfered with by the Appellate Forum.***
>
> ***(d) The power of the Appellate Authority cannot be exercised normally for the purpose of substituting one subjective satisfaction with another without there being any specific and valid reasoning for such a substitution."***

58. **Per Contra,** Haryana Utilities have stated that Lanco had sought relaxation of Regulation 16(iv)(c) of the HERC Tariff Regulations, 2008 by considering the O&M expenses as per Regulation 19(a) of the CERC Regulations 2009. It is submitted that such relaxation was neither permissible nor justifiable in the circumstances of the instant case. Lanco also failed to discharge the burden to establish the fact that circumstances for claiming relaxed norms were on account of reasons not attributable to Lanco. Reference in this regard be made to the decision of the Tribunal in The Tata Power Company Ltd. –v- Jharkhand State Electricity Regulatory Commission (2012) APTEL 154.

58.1 The contention raised by Lanco that the O&M Expenses as well as the rate of escalation prescribed under the HERC Tariff Regulations 2008 was outdated and did not hold good in the present scenario as the State Commission while framing the HERC (Terms and Conditions for determination of Tariff for Generation, Transmission, Wheeling and Distribution and Retail Supply under Multi Year Tariff framework) Regulations, 2012 for the first control period which commenced from 01.04.2014 had done away with the earlier methodology of computation of O&M Expenses based on capital cost and framed the new Regulations in consonance with CERC methodology based on Rs. Lakhs per MW basis is erroneous and in any event does not entitle Lanco to claim relaxation of the applicability of the HERC Tariff Regulations 2008. It is further submitted that the CERC Tariff Regulations 2009 are anyhow on normative basis and therefore any claim contrary to the above norm raised by Lanco could not have been allowed in the first place.

59. Our Findings

59.1 LAPL had filed an application dated 04.02.2014 under Regulation 33 of the HERC Tariff Regulations, 2008 seeking relaxation of Regulation 16(iv)(c) of the said Regulations concerning O&M expenses and to grant O&M expenses of Unit-2 as per CERC Tariff Regulations, 2009. Without prejudice to the above and in alternative LAPL prayed for grant of O&M expenses at least as per actual expenditure incurred by it. Cogent reasons were given to relax the regulations, as is evident from the averments made in the application and documents filed along with.

59.2 Lanco has alleged that the State Commission has denied parity with State Generating Companies as for as relaxing in O&M expenses are concerned. The relevant extract of the Order dated 18.04.2011 of the Commission passed in the Appeal of HPPCL for State Generating Station has been reproduced by Lanco at Para 57.3 above.

59.3 It is an established fact and also, recognised by the State Commission in their order dated 18.04.2011 that adequate amount for O&M expenses is essential for proper upkeep and maintenance of power plants so far as to drive uninterrupted generation and also optimum efficiency. It is noted that the provision in HRC Regulation, 2008 is only 1 % of the capital cost which works out to a meagre amount and not adequate for proper O&M of the power plant. **Though, the relaxation is entirely a discretionary power of the Commission but**

it is settled law that the discretionary power need to be applied while considering justice and equity without discrimination to any party.

59.4 We, therefore, find merit in the claim of Lanco for relaxing the O&M norms as has been done in other cases of generators so as to provide equal treatment. In this regard, we also recall the judgment of this Tribunal (154 of 2012) in regard to exercising of discretionary powers Para 29(b) states as :-

> ***"29(b) If there is a power to relax the regulation, the power must be exercised reasonably and fairly. It cannot be exercised arbitrarily to favour some party and to disfavour some other party.***

59.5 **We, therefore, conclude that the State Commission should have taken a judicious view for allowing adequate O&M expenses to Lanco by relaxing the provisions contained in their Regulation No. 33. It is in the interest of justice & equity to maintain parity between the State Generating Companies and private generating companies (Lanco) as far as expenditures on Operation and Maintenance are concerned.**

60. Issue No. 7 Non-Recovery of Fixed Charges Corresponding to Share of 5% Power Supplied to State of Chhattisgarh.

60.1 It has been contended by Lanco that they are obliged to supply 5% to Chhattisgarh at variable rates as per Implementation Agreement. Accordingly, the fixed charges has to be recovered from 95% of capacity distributed between Haryana and Chhattisgarh in the proportion of 65:35%, which consist of interest on loan, interest on working capital, depreciation, O&M expenses, return on equity and income tax.

60.2 Lanco has submitted that the concessional facilities such as govt. land at nominal rates, other state facilities, clearances and permits etc. provided by Govt. of Chhattisgarh to LAPL has actually helped in reduction of capital cost of Unit 2. The reduction in capital cost has directly helped HPPC by way of lower power purchase cost than it would have been the case when no concessional facilities would have been granted by Govt. of Chhattisgarh..The Commission has failed to appreciate that LAPL has been supplying power to the identified beneficiaries viz. 35% to Chhattisgarh and 65% to Haryana (through PTC) at regulated tariffs under the applicable CSERC/HERC regulations as per the directions of this Tribunal's interim order dated 23.03.2011 which was continued by the Hon'ble Supreme Court in its order dated 16.12.2011. LAPL has to supply the entire power from its Unit 2 to only these two state beneficiaries and cannot sell any power to any other

third party without any further direction from the Hon'ble Supreme Court. As 100% capacity of Unit 2 is allocated to two states beneficiaries, LAPL does not have any spare power for merchant sale in this Unit 2 which implies that there is no possibility of recovery of fixed charges corresponding to 5% of 300 MW (15 MW gross capacity) which is to be supplied at variable charges only.

60.3 Accordingly, either annual fixed charges corresponding to 5% host state share (15 MW gross capacity) need to be included in the total fixed charges of Unit 2 (as claimed by LAPL in its tariff formats) or the fixed charges of the Unit 2 need to be grossed up by 5%. The non-grant of the fixed charges corresponding to host state share of 5% power at variable charges by the Commission has resulted in substantial under recovery of fixed charges of approx. Rs. 16.50 Cr. per tariff year, which is a significant amount for maintaining tariff viability of Unit 2.

61. Per Contra, Haryana Utilities have contested that the claim for recovery of Fixed Charges corresponding to the obligation of Lanco to supply 5% power to the Government of Chhattisgarh at variable cost is misconceived and erroneous. Merely because Lanco under the Implementation Agreement dated 01.08.2009 executed with the State of Chhattisgarh was obliged to supply 5% of power at variable cost only, cannot be taken to mean that the fixed charges would have to be recovered from 95% capacity of Unit II.

61.1 The PPA with Haryana Utilities is before the Implementation Agreement. There is no provision in the PPA or in the Regulations or in law providing for any such adjustment for 5 % Power. The obligation under the implementation Agreement is to the account of Lanco and there can be no adjustment made in the determination of fixed charges in view of the requirement to supply of 5% power to the State of Chhattisgarh at variable cost only.

61.2 Lanco is expected to bear the risk and costs of such an obligation and is solely responsible for implementation thereof. It cannot claim any benefit by recovery of fixed charges for the balance 5% capacity. The question of recovery of fixed charges in any manner from the Haryana Utilities for the State of Chhattisgarh's share of 5% does not arise.

62. Our Findings

62.1 Lanco is obligated to supply 5% power at variable costs as per the Implementation Agreement dated 01.08.2009 executed with the State of Chhattisgarh. Accordingly, Lanco has claimed charges corresponding to their obligation to supply 5% power to the State of

Chhattisgarh at variable costs. On the other hand, Haryana Utilities have contested that as per the PPA, there is no such provision. As per HPPC, Lanco is expected to bear the risk and cost of such obligation and it cannot claim for any recovery of fixed charges for the balance 5% capacity from Haryana Utilities. Lanco has relied upon the orders dated May, 2014 and September, 2016 in respect of Adhunik Power and Natural Resources Ltd. (APNRL) passed by the JSERC, wherein JSERC held as follows:

"The Commission also notes that in case the Annual Fixed Charges are not allowed to be recovered from the balance capacity of 88%, the generating company shall be unable to recover the fixed charges corresponding to 12% of the capacity and the same shall lead to significant reduction in its return on equity."

62.2 **The reliance of Lanco on the above order of JERC may not be justifiable as the same pertains to some hydroelectric project. In case of hydro projects, 12 percent free power is given to the home state for the distress caused by setting up of the project in form of compensation to local area's affected persons. In the instant case, the matter is altogether different and any provision to the effect of obligation of Lanco to supply 5% power at variable cost to Chhattisgarh does not find a place in the PPA signed by Lanco/PTC with Haryana Utilities. We, therefore, agree with the decision of the State Commission for not considering/allowing recovery of fixed charges for the reference 5% capacity to Lanco.**

63. Summary of Our Findings

63.1 Based on our findings and analysis in both the Appeals as brought out in above paras , we summarize our findings as under:

- **We find that all the issues arising out of both the Appeals for our consideration (except O&M expenses) have been analyzed and dealt with by the State Commission applying judicious and equitable approach and hence, do not invite any intervention of this Tribunal.**

- **Regarding relaxation of the provisions contained in the Regulation No. 33, we do not find any justification to accept the reasoning assigned by the State Commission and conclude that the State Commission should have taken a judicious and reasonable view for allowing adequate O&M Expenses to Lanco so as to maintain parity with the State Generating Companies and Private Generating Companies. With this view, we direct the Haryana Electricity Regulatory Commission (HERC) to re-consider this issue afresh and pass the appropriate order in accordance with the law in the interest of justice and equity.**

Order

Having regard to the factual and legal aspects of the matter, we are of the considered view that the issues raised in the Appeal No. 107 of 2015, are devoid of merits and the appeal filed by the Appellants, Haryana Power Purchase Centre and Haryana Power Generation Corporation Limited, is hereby dismissed.

The Appeal No. 117 of 2015 filed by the Appellant, Lanco Amarkantak Power Limited, is partly allowed so far it relates to the extent of O&M expenses as indicated under Para 63.1, at supra.

Therefore, the impugned Order dated 23.01.2015, passed by the State Regulatory Commission, is hereby upheld on all issues excepting O&M expenses.

The State Commission is directed to pass the consequential order as per the directions referred above in this judgment within a period of three months from the date of receipt of the copy of the judgment.

No order as to costs.

Pronounced in the open Court on this **21st day of March, 2018.**

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

REPORTABLE / ~~NON-REPORTABLE~~